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Controlling Irregular Migration in Canada

Reconciling Security Concerns with Human Rights Protection

François Crépeau
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Immigration and Refugee Policy

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Acronyms

ATCSA	*Anti-terrorism, Crime and Security Act* (UK)
CBSA	Canada Border Services Agency
CCR	Canadian Council for Refugees
CCRA	Canada Customs and Revenue Agency
CFC	Canada Firearms Centre
CIC	Citizenship and Immigration Canada
CISC	Criminal Intelligence Service Canada
CSC	Correctional Service Canada
CSIS	Canadian Security Intelligence Service
DHS	Department of Homeland Security (US)
ECHR	European Convention on Human Rights
IRB	Immigration and Refugee Board
IRPA	*Immigration and Refugee Protection Act*
NPB	National Parole Board
PNR	Passenger Name Record
PSEPC	Public Safety and Emergency Preparedness Canada
RAD	Refugee Appeal Division
UNCAT	United Nations Committee Against Torture
UNCERD	United Nations Committee on the Elimination of Racial Descrimination
UNHCR	United Nations High Commission for Refugees

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Reconciling Security Concerns with Human Rights Protection

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Delphine Nakache

> International human rights law, international humanitarian law, international refugee law and international criminal law: each chapter of this corpus stands as a fundamental defense against assaults on our common humanity... The very power of these rules lies in the fact that they protect even the most vulnerable, and bind even the most powerful. No one stands so high as to be above the reach of their authority. No one falls so low as to be below the guard of their protection. *Sergio Vieira de Mello, United Nations General Assembly, November 2002*

Introduction

In the last few years, large numbers of people fleeing persecution, human rights violations and armed conflicts, or displaced by natural or human-made disasters, have sought asylum in developed countries around the globe. However, the UN High Commission for Refugees (UNHCR) reported in March 2005 that the number of asylum-seekers arriving in industrialized countries had dropped 40 percent since 2001, to reach in 2004 its lowest level for 16 years (396,400). Whereas Europe as a whole (44 countries, including countries of the former Soviet Union and former Yugoslavia) saw asylum applications decline by 21 percent between 2003 and 2004, the United States and Canada recorded a 26 percent decrease, and Australia and New Zealand a 28 percent drop, which is the largest fall in asylum requests. Canada was in 2004 the fifth-largest destination country for asylum-seekers, preceded by France (the largest destination country), the United States, the United Kingdom and Germany (UNHCR 2005).

When requesting asylum, some migrants fall within the narrow class of "refugee," as defined by the 1951 Refugee Convention and the Refugee Protocol.[1] Some, though in need of protection and relief, do not. However, in the last few decades, the international

community has developed a number of instruments that could potentially affect every person involved in migration. Constitutional, regional and universal standards dedicated to the protection and promotion of rights and freedoms of all in general, and of migrants in particular, are more sophisticated, and implementation mechanisms are more effective than before. These instruments have been developed to impose on states duties toward individuals based not on their nationality but on their humanity. In other words, the central notion of human rights is "the implicit assertion that certain principles are true and valid for all people, in all societies, under all conditions of economic, political, ethnic and cultural life... These principles are present in the very fact of our common humanity" (Stackhouse 1984, 1).

But recently, states whose sovereignty is affected by many aspects of globalization in the economic and social fields, have tried to regain political ground by emphasizing their traditional mission, that of national security. In the past two decades, the phenomenon of the "securitization" of the public sphere has emerged. This phenomenon is defined as the overall process of turning a policy issue (such as drug trafficking or international migration) into a security issue (Faist 2004). This resulted in the definition of new fields of government activity: food security, environmental security, biosecurity, transport security, industrial security, international security and migration security, to name only a few.[3]

In this new context, where migration has been gradually "located in a security logic" (Huysmans 1995, 230), migration controls have become an important part of the securitization agenda, which is a major step in the process of

> the creation of a continuum of threats and general unease in which many different actors exchange their fears and beliefs in the making of a risky and dangerous society. The professionals in charge of the management of risk and fear especially transfer the legitimacy they gain from struggles against terrorists, criminals, spies and counterfeiters towards other targets, most notably transnational political activists, people crossing borders or people born in the country but with foreign parents. (Bigo 2002, 63)

The securitization agenda actually emerged years before the events of 9/11, although those attacks gave authorities more incentive to radically change migration policies and make them harsher toward unwanted migrants. This shift has also been attributed to the altered roles of the military and other security forces in the post-Cold War period (Dunn and Palafox 2000). Securitization as a process means that the spheres of *internal* and *external* security are merging after a period of polarization in which those two areas of activity had hardly anything in common. We have witnessed a change in perspective: states – and specifically their external security agencies, which traditionally worked against a foreign enemy – have identified new threats, such as terrorism, international criminality and unemployment, which coalesce in the image of the migrant. These threats affect the state from the inside but are very often publicly defined as having their origin "out there" (Bigo 1994, Bigo 1998, Kostakopoulou 2004, 45).

Securitization is also taken up by political leaders. Indeed, the promise of a threat-free society can be an inspired way to win votes, and states clearly see controlling the number of migrants as an electoral issue. This situation is exacerbated by the fact that non-citizens generally cannot participate in the democratic decision-making process of the state where they reside. As such, their preferences are unlikely to count for much in politicians' calculations. Public opinion usually views the state as an institution made to advance the interests of its citizens rather than those of foreigners, even resident ones. In this context, states feel perfectly justified in implementing migration policies that attach more weight to the potential costs of migrants to citizens than to the rights of migrants themselves, and especially refugees (Aradau 2001; Gibney 2003). The policies of the Howard government in Australia exemplify this phenomenon.

The stronger the state, the more draconian the measures it can take, especially given the new surveillance and military technologies available. Nations have developed an arsenal of measures designed to directly (physical barriers) or indirectly (deterrence) prevent migrants – especially irregular migrants – from setting foot on their territories. In the process, they have re-emphasized the role of the border as the traditional and tangible symbol of national sovereignty and, with that, border control as a convenient tool for distinguishing between "us" and "them."

This tightening of migration laws and policies in many of the destination countries has led to a decrease in the legal opportunities for international migration, creating an environment that is very conducive to migrant smuggling. If stricter border controls are imposed, more people will turn to irregular means of migrating, including resorting to smuggling organizations, because they will feel they have little

choice. Although the information here is very patchy, some 800,000 people may be smuggled across borders every year (Bhabha 2005). In brief, the stricter the controls, the more difficult the journey (price, route, means) and the more people risk their lives crossing the border. This has led observers to challenge the wisdom of the enhanced barriers in the long run:

> Much of existing policy-making is part of the problem (of increasing human trafficking and smuggling) and not the solution. Refugees are now forced to use illegal means if they want to access Europe at all. The direction of current policy risks not so much solving the problem of trafficking, but rather ending the right of asylum in Europe, one of the most fundamental of human rights. (Morrison and Crosland 2001, 1)

The situation is further complicated by the fact that there is, today, no clear definition of "irregular migration." The concept covers a number of rather different issues that are implicitly but not explicitly defined in international law. For this paper, the term "irregular migrant" refers to any migrant who is in – or tries to enter – a destination country without proper authorization. This includes those who entered clandestinely, those who entered with forged documents and those whose entry was legal but whose stay in the destination country is not. The term "irregular migrants" then means the same as "illegal migrant," "undocumented migrant" and "clandestine migrant," all of which describe migrants who do not clearly come within one of the national definitions of legal entry, residence and work, and who thus fall into a grey area of the law (Guild 2004, 4).

In brief, we are in a situation where although international human rights law standards stress the fundamental rights of all individuals in the face of state action, states often attempt to define the individual rights of migrants more narrowly by emphasizing the "noncitizen" legal status of such people. Thus, while the gap between "us" and "them" has been constantly reduced through the prism of the international human rights movement (implementing the human rights paradigm, which is *inclusive*), this gap has been widened by states in their continuing search to exercise migration controls through a variety of ever more sophisticated means (based on the territorial sovereignty paradigm, which is *exclusive*). How, then, is it possible to reconcile these two paradigms?

While answering this question, it should be made clear that there is no simple solution in such a complex field as migration. A good example of the interconnectedness of the modern world is the scale of migration and the capacity of many individuals to move among states and regions. While in recent times this movement may have been a result of the increased availability of international travel, it must be remembered that human history has been marked indelibly by migration. "Exclusionary discourses" that assert the homogeneity of "nation states" might seek to deny it, but heterogeneity has always been the norm in human history. The resulting diversity has enriched numerous societies, and host countries have benefited immeasurably from the contributions made by immigrants and refugees. One facet of the response to the increased anxiety about the mobility of some groups (and the call for more stringent regulation) should therefore be to emphasize the benefits of migration and the pluralism it has fostered. It should not lead us to neglect the root causes of migration: people have always moved from unstable and poor environments to more prosperous and secure societies. Thus, as long as there are global inequities in wealth and prosperity on the planet, the migratory pressure on wealthier and more democratic zones will remain.

One key objective in the attempt to reconcile, in law, the sovereignty and human rights paradigms is to recognize that the principle of territorial sovereignty cannot justify unlimited human rights violations based on nationality. This principle will guide our development in this paper of a conception of territorial sovereignty that is compatible with the mechanisms and structures of the international system.

Canada is facing this dilemma, as are all other Western countries. Both paradigms are simultaneously affecting all migrants. Canadian authorities feel the pressure of migration at the borders and have tried to prevent irregular migration with an array of deterrent and repressive measures. Indeed, in a context where migrant smuggling serves approximately half the irregular migrants worldwide (IOM 2003), Criminal Intelligence Service Canada (CISC) presents it as being "evident" in international airports (although it does not provide any figures on human smuggling and trafficking to support this argument). More precisely, according to CISC,

> Organized crime groups are involved in transporting smuggled and trafficked individuals to Canada with some individuals destined for the US. Persons trafficked into prostitution, and to a lesser extent into forced labor, in Canada come primarily from southeast Asia and eastern Europe. Asian-based organized crime groups in particular are involved in human smuggling/trafficking in Canada. (2004, 38)

Canada has also been at the forefront of the movement to increase the protection of human rights for all. Indeed, the case law created by Canadian courts based on the Canadian Charter of Rights and Freedoms (hereafter the Canadian Charter) is a model that is referred to all over the world. The reconciliation of these two approaches in Canada will be a task for the judiciary: finding clear ways to maintain the societal values that are reflected in the Canadian Charter and that are necessary in a free and democratic society, including protecting rights and freedoms guaranteed to all while ensuring security for all. In fact, the role of the judiciary has not changed, but the international, political and social environment has.

The first part of this study will explain the increasing protection of the human rights of migrants, consonant with the growing human rights culture generally, worldwide and in Canada in particular. The second part will demonstrate how, paradoxically, the rights of noncitizens have been eroded in recent years through the enactment of a stricter migration regime. The third part will focus particularly on the changes that have occurred under various security agendas, especially since 9/11.

Increased Protection of the Human Rights of Migrants

Human rights instruments have developed to impose on states duties toward individuals based not on their nationality but on their humanity or "personhood" (Harvey 2000). They entitle noncitizens to equality before the law, to a fair hearing before independent and impartial tribunals in proceedings that affect their rights and obligations, and to an effective remedy to enforce their substantive rights under international conventions. The record of UN treaty bodies and other human rights mechanisms in addressing violations of noncitizens' human rights, though still incomplete, is developing in a positive manner on the international scene. What's more, Canadian standards provide noncitizens with a high level of protection (except in state security cases), generally consistent with international human rights norms.

Protecting foreigners within international and regional human rights systems: substantive and procedural standards

To carry out their pledge under the Charter of the United Nations to take action together and separately in cooperation with the UN, to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion" (arts. 55-6), states have engaged in an intense international effort, coordinated by the UN, to codify fundamental freedoms in numerous declarations and treaties. Human rights mechanisms have also been established on a regional basis in Europe, Africa and the Americas (Buergental 1995).[1] No universally accepted codification of the human rights of migrants has yet been achieved. However, numerous international and regional human rights instruments and mechanisms can be employed to protect migrants, whether they be regular or irregular. The limited scope of this study does not allow for a full review of these instruments. The following section briefly describes the potential of international human rights instruments as sources of substantive and procedural standards for enforcement of migrant rights.

The right to seek and enjoy asylum

The right to seek and enjoy asylum is guaranteed by a range of international and regional instruments.[2] Although there is no universally accepted definition of asylum, it has been described as "the sum total of protection offered by a state on its territory in the exercise of sovereignty" (Harvey 2000, 47). The right to seek and enjoy asylum can be understood as the right of all individuals to escape from countries where they suffer profound violations of their basic human rights. Since those who exercise this right no longer benefit from the protection of their home countries, they are entitled to special protection by the international community. It should be noted, however, that the granting of asylum is exercised at the discretion of individual states: there is no *right* to asylum at the international level.

The principle of nonrefoulement

Nevertheless, international law recognizes an absolute prohibition against forcibly returning a person to a country where that person may be subjected to torture, and thus requires the implementation of effective remedies to guarantee the protection of this right (Lauterpacht and Bethlehem 2003). The principle of

nonrefoulement has traditionally been defined in refugee law as the prohibition of the return of a refugee to "territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (1951 Refugee Convention, art. 33). However, the scope of the principle is now broader: it applies to torture and cruelty and to all persons, not only refugees. Nonrefoulement has found expression in various international and regional instruments.[3]

A categorical expression of the principle of nonrefoulement is incorporated into article 3(1) of the Convention against Torture, which is an absolute and nonderogable provision.[4] Of all treaty bodies, the UN Committee against Torture (UNCAT) has to date been the most active in developing case law on behalf of rejected asylum-seekers who, by bringing individual complaints, are looking to human rights treaties for alternative protection against deportation to their countries of origin: this puts political pressure on states not to send a person back to a place where s/he is likely to be tortured. The cases decided by UNCAT have moved the law on refugee protection in a positive direction. Several countries, including Canada, have been involved in the jurisprudence of the Committee against Torture. In a 1994 case, UNCAT found that Canadian authorities had an obligation to refrain from forcibly returning Tahir Hussain Khan – a citizen of Pakistan of Kashmiri origin and a rejected asylum-seeker in Canada – to Pakistan. In December 2004, the committee, hearing a complaint from a Mexican claimant whose application for refugee status in Canada had been rejected, found that the Canadian refugee determination system had been unable to correct an erroneous decision.[5] What is important here is that UNCAT puts the protection of the individual ahead of the sovereign powers of the state. Unless the state disproves the applicant's evidence, the committee will favour protecting the human rights of the noncitizen. In its concluding observations of May 20, 2005, to Canada's fourth and fifth periodic reports, UNCAT expressed concerns at several aspects of Canada's immigration and antiterrorist policies; for instance, the blanket exclusion of the status of refugee or person in need of protection for people falling within the security exceptions set out in the 1951 Refugee Convention; the explicit exception of certain categories of people posing security or criminal risks from the protection against refoulement; Canada's apparent willingness to resort to immigration processes to remove or expel individuals from its territory rather than prosecute them for terrorism and torture offences; and Canada's reluctance to comply with all requests for interim measures of protection, in the context of individual complaints. Among its recommendations, the committee urged that Canada unconditionally undertake to respect the absolute nature of article 3 in all circumstances and to fully incorporate the provisions of article 3 into the Canadian domestic law (UN Committee against Torture 2005).

Other instruments are lending support to the principle of nonrefoulement. As stated in its General Comment 20, the United Nations Human Rights Committee also considers that the prohibition of torture in article 7 of the International Covenant on Civil and Political Rights encompasses the prohibition of forcibly sending persons to countries where they may be subjected to torture or ill-treatment (UN Human Rights Committee 1992).

The principle of nonrefoulement is nowadays generally considered, with respect to torture, as an imperative obligation under customary international law, indeed a part of *jus cogens* (Lauterpacht and Bethlehem 2003). The UN special rapporteur on torture routinely intervenes in cases where there is serious risk of extradition or deportation to a state or territory where the person in question would likely be in danger of being tortured (see UN Commission on Human Rights 2003: 2002, para. 8).

The case law that has developed within the European human rights system upholds protection from expulsion to a country when there are substantial grounds to believe that the person would be at risk of being tortured or subjected to cruel, inhuman or degrading treatment or punishment as defined under article 3 of the European Convention on Human Rights.[6]

At the domestic level, some states have incorporated the terms of article 3 into their asylum procedures. In Canada, for example, an individual may apply as a "person in need of protection," under section 97(1) of the *Immigration and Refugee Protection Act* (hereafter *IRPA*),[7] if he or she is at risk of torture or cruel and unusual treatment or punishment. In effect, torture has been incorporated as another ground for refugee status (McAdam 2004: 628, 639).

Procedural rights relating to expulsion of aliens

The right to challenge an expulsion is vital to the right to seek asylum and to the principle of nonrefoulement, as well as to fundamental justice generally. Although it may be distinguished from extradition, the term "expulsion" covers all measures that result in the

migrant being sent outside of the jurisdiction of the receiving state (Pacurar 2003, 17).

Human rights standards relating to expulsion of noncitizens lawfully in the territory of a state (that is, "persons who have entered a state territory in accordance with its legal system and/or are in possession of a valid residence permit and subject to state procedures aimed at their obligatory departure" (Novak 1993, 202) provide that expulsion must be decided by a competent authority in accordance with the law and must allow individuals to give reasons why they should not be expelled.[11] Individuals are entitled both to have the decision reviewed and to be represented before the appeal or review authority (UN Human Rights Committee 1986). The procedural safeguards guaranteed by article 13 of the International Covenant on Civil and Political Rights are considered *minimal*, and, indeed, states may provide for more, such as the right to appear in person at the review proceedings and the right to judicial assistance (Heckman 2003, 225).

Although irregular migrants benefit, to a lesser extent, from the procedural rights relating to expulsion, they are equally protected against collective expulsions. Collective expulsions are indeed clearly prohibited by article 22 of the Convention on Migrant Workers, as well as by regional human rights laws, without distinguishing between lawfully and unlawfully resident foreigners (Council of Europe 2001).[12]

Guarantee of an effective remedy to enforce substantive rights

Most human rights treaties require states to provide an effective remedy to people whose treaty rights are found to have been violated.[13] Therefore, state procedures affecting such treaty rights must contain a minimum of procedural safeguards and make available certain preventive remedies, such as injunctive relief (Heckman 2003, 229).

In *Chahal*, a refugee and Sikh activist successfully argued before the European Court that judicial review of the minister's decision to deport him as a risk to national security was not an effective remedy because the reviewing courts had been unable to independently assess the evidence for his claim that there was substantial risk of his being subjected to torture upon repatriation. This decision confirmed the absolute nature of the prohibition against torture by outlawing any balancing act between the interests of national security and the right of an individual to be free from torture and showed that effective remedy provisions in international human rights instruments can be used to challenge the sufficiency of domestic judicial and administrative decision-making and review mechanisms (Heckman 2003, 230).[14]

An appeal mechanism that can review the facts and law of the case is thus essential. The UN Committee against Torture, in its concluding observations of May 20, 2005, to Canada's fourth and fifth periodic reports, recommended that Canada provide for judicial review of the merits, rather than simply of the reasonableness, of decisions to expel an individual where there were substantial grounds to believe the person faced a risk of torture (UN Committee against Torture 2005).

Equality provisions

The nondiscrimination standard, notable for being included in the United Nations Charter[15] and for being considered *jus cogens*,[16] plays a central role in defining the human rights of migrants. Most international and regional human rights treaties contain equality provisions requiring states to guarantee individuals equality before the law and equal protection of the law without discrimination (Fitzpatrick 2003, 172).

A differential treatment between nationals and non-nationals is permissible where the distinction is made pursuant to a legitimate aim, where it has an objective justification, and where reasonable proportionality exists between the means employed and the aims to be realized (UN Human Rights Committee 1986; 1989, 78).

A state party must ensure that the rights enumerated in the International Covenant on Civil and Political Rights are available to "all individuals within its territory and subject to its jurisdiction" (art. 2[1]), irrespective of reciprocity and nationality (art. 2[1], 26).[17] The rights in the International Covenant on Civil and Political Rights as they relate to distinctions against migrants can be divided into five categories (Fitzpatrick 2003, 174):

- Some rights must be provided on an equal basis to nationals and migrants, because the right is absolute or because selective denial would never be reasonable or proportionate: right to life (art. 6); prohibition on torture (art. 7); prohibition on slavery (art. 8); right to leave the country (art. 12[2]); equality before the law and fair trial rights (art. 14); right to recognition as a person before the law (art. 16); freedom of thought, conscience, religion (art. 18) and opinion (art. 19[1]); the right of children to measures of protection (art. 24); the right of minorities to culture, religion and language (art. 27).

- Certain articles prohibit "arbitrary" state action, which may permit narrow distinctions between nationals and migrants. For example, the prohibition on arbitrary arrest and detention does not exclude immigration detention only of migrants, but it limits detention and does not permit migrants to be treated differently in the criminal context. The right to take judicial proceedings to challenge the lawfulness of detention is non-derogable. The family is protected against "arbitrary or unlawful interference" (art. 17).
- Distinctions against migrants may sometimes be justified under limitations clauses permitting restriction on grounds such as national security or public order but subject to the general principles that require legitimate aims and proportional means: manifestation of religion (art. 18), freedom of expression (art. 19), freedom of association (art. 22).
- Certain political rights are explicitly limited to citizens, such as the right to take part in public affairs, to vote, and to have access to public service (art. 25).
- Some provisions specifically protect migrants (art. 13 on expulsion), while others protect only nationals and lawfully present migrants (such as the right to internal freedom of movement in art. 12[1]).

In summary, migrants are entitled to equal protection with respect to many civil and political human rights, especially those relating to security of the person and due process. All non-derogable rights demand equality, but others (such as the right to fair trial) do as well. This will prove especially important when national security issues are at stake.

The human rights of migrant workers

The Convention on Migrant Workers is the most recent and large-scale effort for a human rights response to migration in international law. Support among nations has been tentative. The convention came into force 13 years after it was opened for ratification and still, as of March 2005, major migration-receiving states (including Canada) were not among the 27 state parties.

The Convention on Migrant Workers addresses the situation of working migrants, entitling them to the same pay, hours, safety considerations and other workplace conditions that nationals enjoy. However, the convention goes beyond rights in the workplace by enumerating a comprehensive list of protections for migrants' family members, with the goal of acknowledging migrant workers as more than simply economic factors of production.

The Convention on Migrant Workers also protects irregular migrants: "every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law" (art. 24). As a consequence, irregular migrants are ensured some legal rights identical to those afforded to regular migrant workers and their families: fundamental rights (arts. 8-24, 29); national treatment in matters such as equal conditions of work (art. 25), trade union rights (art. 26), social security (art. 27) and basic education (art. 30); preservation of cultural identity (art. 31); and repatriation of savings (art. 32).

In conclusion, the human rights of migrants have been low on the international human rights agenda, but this issue is now finally gaining more visibility. Substantive and procedural standards are being developed or simply applied to them within international and regional human rights systems, thus reinforcing migrants' status as holders of rights and not simply targets of states' sovereign power.

The Canadian standards: a high level of protection afforded to foreigners

The concept of using international human rights law as guidance in the interpretation of Canadian law standards has been accepted by the Supreme Court of Canada in its case law. Moreover, the enactment of the Charter has engaged the Canadian courts in an intense process of better defining and defending migrants' human rights.

Using international human rights law in interpreting domestic standards

Given the prevailing dualist approach regarding the role of international law within Canada's legal system, internalizing unimplemented international standards within Canadian law can be problematic.[8] Over the years, however, the Supreme Court of Canada recognized the important role of international law in interpreting the Constitution (Bastarache 2001, 9-10; La Forest 1996).[9]

The Supreme Court of Canada has articulated some important guiding principles, especially in migration matters. In fact, in Canada, as in Australia and New Zealand, the majority of the case law concerning the use of international human rights standards in domestic law seems to emerge from the administrative realm, and most of those administrative cases concern some aspect of immigration or refugee law (Macklin 2002). One of the reasons for this situation is that, traditionally, state authorities have dealt with foreigners with almost complete discretionary powers. It was believed, in accordance with the principle that

immigration is a privilege not a right, that foreigners had no right to oppose any decision affecting them made by competent authorities. With the advent of the constitutional protection of human rights and the recognition of international human rights law as a source of interpretation, however, this situation has changed considerably in Canada.

A good example of this trend can be seen in the way international law is used to interpret Canada's *IRPA*, which itself contains the definition of "refugee" and the exclusion provisions found in the 1951 Refugee Convention. It is not infrequent to see Immigration and Refugee Board (hereafter IRB) decisions using human rights standards elaborated in international instruments in order to determine whether the claimant fears persecution (Macklin 2001, 326).

Decisions from the Supreme Court confirm this trend. In *Pushpanathan*, the majority held that, since the purpose of incorporating article 1F(c) of the 1951 Refugee Convention in the *IRPA* was to implement that convention, an interpretation consistent with Canada's obligations under that convention had to be adopted.[20] In *Baker*, the Supreme Court established that, although Canada had never incorporated the Convention on the Rights of the Child into domestic law, the immigration official exercising discretion in deportation cases was nevertheless bound to consider the "values" expressed in that convention, specifically the principle of "the best interests of the child."[21] *Baker* was of tremendous importance for administrative law, since it directed administrative decision-makers to look to those values in conventional international human rights law that resonate with the fundamental values of Canadian society in order to identify the relevant considerations delimiting their discretionary decision-making powers. In *Suresh*, a case decided after 9/11, the court, recognizing that Canada has a legitimate and compelling interest in combatting terrorism but is also committed to fundamental justice, decided that expelling a suspected terrorist to a country where he faced the risk of torture violated the principle of fundamental justice protected by section 7 of the Canadian Charter and confirmed the absolute prohibition of torture and the principle of nonrefoulement "even where national security interests are at stake."[22]

In conclusion, there are important judicial pronouncements on the domestic application of international human rights law standards. Although much depends on the particular circumstances of the case, we see from the Supreme Court's decisions that the weight of international standards can be important. This is especially significant when trying to limit the discretionary nature of government's decisions regarding foreigners who are suspected of terrorist activities.

The standards in the Canadian Charter of Rights and Freedoms: scope and limitations

Since 1982, fundamental rights and freedoms have been set forth in the Canadian Charter, providing an essential conceptual framework in asylum and migration issues, as government legislation, programs and policies have been tested against its standards.

Section 7: fundamental justice is owed to foreigners

The Supreme Court, in *Singh*, held that refugee claimants – that is, claimants who are neither citizens nor permanent residents of Canada – are entitled to claim the protection of section 7 of the Charter, which provides that everyone should enjoy security of the person. This encompasses "freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself."[23] Specifically, *Singh* established that the assessment of a risk to the security of the person means an assessment of the threat to any of the three rights guaranteed to a refugee – that is, the right to status determination, the right to appeal a removal or deportation order and the right to protection against refoulement – and stressed that impairment of these rights would threaten security of the person, as they were "the avenues open to [the refugee claimant] under the Act to escape from...fear and persecution."[24] The court then determined that the procedure used in Canada to decide a refugee claim (that is, a written record of the examination before an immigration officer) did not comply with the principles of fundamental justice because it did not provide an adequate opportunity for claimants to state their case and to respond to contrary evidence (the right to an oral hearing). The *Singh* decision had a significant impact on refugee law in Canada, pushing the federal government to create the IRB in 1989 to provide an oral hearing to eligible refugee claimants.

Section 7 applies to "everyone," and the court saw no reason to exclude refugee claimants from its scope. In essence, the Supreme Court of Canada embraced a theory of reciprocity of obligations and rights; that is, if asylum-seekers are to be subject to the full force of Canadian law, then they are logically entitled to benefit from Canadian standards of respect for human dignity (Galloway 1994; Eliadis 1995).

Since *Singh*, the Supreme Court has had occasion to examine the Charter rights of noncitizens in a variety of immigration and refugee protection concerns. A more restrictive outlook has characterized cases relating to national security or state sovereignty concerns. As regards the nonrefoulement standard, Charter protection or remedies have been denied, essentially on the basis that noncitizens possess virtually no recognizable life, liberty or security of the person that would be violated by their removal from Canada.[7] To date, the courts have also upheld the process on the basis that detainees held under immigration laws are entitled to a diminished level of Charter protection. These decisions constitute a partial retreat from the breadth of *Singh*, and they have been described as "the low point in Canadian jurisprudence as it relates to the protection of noncitizens" (Waldman 1992, para. 2.72.48).

Section 15: the right to equality

Section 15(1) of the Charter guarantees to an individual equality before and under the law and the right to "equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability."

Canadian courts still struggle with section 15 and its interpretation. In *Andrews*, the Supreme Court initially took a broad view of the guarantee of section 15 as it applies to foreigners. The court there held that section 15 prohibits discrimination on the basis of the analogous ground of citizenship. The inference from *Andrews*, then, is that the institutional and procedural safeguards afforded to Canadian citizens should be made available to similarly situated noncitizens. In fact, this has not really happened.[8]

In *Chiarelli*, the Supreme Court rejected the claim that the *Immigration Act* violated section 15 by authorizing the deportation of only noncitizens. This does not mean, however, that the manner in which the decision to deport is taken can be arbitrary in any way. In *Baker* and *Suresh*, the Supreme Court outlined the principles governing the content of the duty of fairness that applies in cases of a deportation order, including participatory rights, but the analysis never developed around the concept of equality before the law.[9]

The *Andrews* test was revisited in the *Law* case and made more stringent, adding in particular a requirement that the discrimination must constitute a violation of human dignity.[10] In the very few cases where the rights of noncitizens have been at stake since *Law*, and even more since 9/11, the courts have taken a very positivist attitude and upheld quite systematically the distinctions made by the government or the legislature among citizens, permanent residents and foreign nationals. The courts found no violation of human dignity in the differentiated treatment of foreigners as foreigners.[11] Although the section 15 argument has often not been well substantiated by lawyers, leaving room for further developments, for the present it seems clear that "section 15...with its promise of equality before the law, has no traction when it comes to the exclusionary dimension of immigration law" (Macklin 2004).

In conclusion, Canadian law contains valuable standards for noncitizens in general and asylum-seekers in particular. However, each has limitations, and these limitations are exacerbated by the present immigration context, which is characterized by an emphasis on security and a narrower reading of the rights and interests of noncitizens.

Despite the incidence of abuse, migrants' rights have long been on the margins of the international human rights agenda, essentially because of a lack of data, the gaps between different institutional mandates, the existence of parallel systems for protecting employment rights and human rights, the dearth of reporting by human rights NGOs, the dominance of refugee protection in the migration field, and the fact that, until the Convention on Migrant Workers was drafted, human rights law only made implicit reference to migrants (as non-nationals) in the context of the free movement of labour. In the last two decades, however, there has been greater recognition of the issue of the rights of migrants, with new international standards, new interpretations of existing norms, new data-collecting and new reporting mechanisms strengthening awareness and creating new protection tools (Grant 2005).

The relationship between migration and human rights is extremely complex, however. First, it is multifaceted. Human rights issues arise at all stages of the migration cycle: in the country of origin, during transit and in the country of destination. Second, while international human rights law recognizes the right to leave one's own country, there is no corresponding right to enter another country without that state's permission. There is a genuine tension between international law and the exercise of state sovereignty, particularly in the present era of globalization, when control over the movement of people across national borders has become a last bastion of national sovereignty (Dauvergne 2004). In other words, states adopt migration policies that best

suit the interests of the state and its society. Nevertheless, if a state decides that a migrant has entered the country illegally, this decision needs not, in itself, if properly taken, conflict with human rights principles. Third, although the link between migration and security is not new, growing security concerns in the last few years have fundamentally changed the playing field of immigration regulation. And the tendency to view migrants as a threat to national security has coincided with the re-emergence of anti-immigrant politics on the extreme right. It should be remembered, however, that treaty law is an explicit acceptance by nation states of some limitation to their sovereignty as well as an agreement to abide by the standard set out in international law. A migrant who has entered or remained in a country illegally is not per se a criminal, and a migrant's being merely in breach of immigration regulations does not nullify the state's duty under international law to protect his or her basic rights without discrimination.

In brief, Western democracies are increasingly caught between accepted rights-based standard on the one hand, and political and security pressures to effectively and securely control their borders on the other.

The Canadian Migration Regime: Erosion of Foreigners' Rights

In dealing with security and immigration issues, host countries have taken a number of steps to reduce the rights and freedoms of noncitizens. They have strengthened their control over noncitizens through harsher immigration measures to police their external borders (Gibney and Hansen 2003). This is true for most Western countries, although in varied ways, since each country has a different legal, constitutional and international setting.

There is a long list of measures from which countries can find inspiration in designing their own strategies. *Preventive measures* are used to prevent irregular migrants from setting foot on the territory, while *deterrent measures* allow for such rash treatment of undesirable foreigners that other foreigners in a similar situation will think twice before trying to reach the territory.

Preventive measures

Beginning in the early 1980s, a number of immigration policy measures, notably visa regimes and carrier sanctions, were either initiated or retooled in order to prevent the arrival of irregular migrants or asylum-seekers.

Visa regimes

Many countries now use visa regimes explicitly to prevent the movement of people from source countries to their territory. Australia requires visas for all foreign nationals wishing to enter its territory, whereas Canada, the US and EU member states require visas only for the nationals of countries deemed to produce large numbers of asylum-seekers (such as Iraq and Afghanistan) or overstayers (such as Morocco or Nigeria). Canada and the US have, under the Smart Border Agreement,[10] harmonized visa requirements, resulting in a situation where the citizens of some 175 countries now require visas to enter the two states (DFAIT 2004). A similar harmonization now prevails for all countries in the EU's Schengen area, where undesirable migrants are not only prevented from entering one country, but they are prevented from entering a whole region.[11]

While visa regimes have purposes other than stopping asylum flows, the linkage with asylum has become clear with, for example, the imposition of a visa requirement for Tamils by the British government in 1986, for Algerians by France in the same year and, most recently, for Hungarians by Canada in 2002. In almost all cases, asylum-seekers wishing to travel to the West have to apply for visas, and Western states can simply deny visas to those believed to be seeking asylum (Gibney and Hansen 2003).

Visa requirements are the most frequent migration control device and are most effective when they are used in conjunction with carrier sanctions.

Carrier sanctions

Carrier sanctions are fines or other penalties imposed by states on airlines, railways and shipping companies for bringing foreign nationals to their territory without the required documentation (for example, valid passports and visas). These sanctions transfer migration management to private carriers, who, if they wish to avoid substantial fines, must make decisions on the possession and authenticity of the documents presented by travellers. Canada's *IRPA* has several provisions that make carriers responsible for the removal costs of passengers arriving at Canadian airports without proper documents (ss. 148[1][a], 279[1]). Under the *IRPA*, the Canada Border Services Agency (CBSA) charges a carrier an administration fee for each traveller arriving with improper

documents. The CBSA has signed agreements with most airlines flying regular routes to Canada. Carriers with good performance records pay reduced administration fees. Carriers without signed agreements pay C$3,200 for each traveller with improper documents. For carriers with signed agreements, the fee drops to between zero and C$2,400, depending on the carrier's history of transporting undocumented travellers. Airlines, in turn, agree that immigration control officers will train their staff and assist them at foreign airports in identifying passengers with improper travel documents (Crépeau and Jimenez 2004). Preinspection agreements also enable countries to post immigration officers at airports, train stations or ports of foreign countries to screen out improperly documented migrants.

Interdiction and interception mechanisms

Like most Western countries, Canada has increasingly resorted to interception and interdiction abroad (in countries of origin or of transit) to prevent irregular migrants from entering its territory. Interdiction policies, which convey a strong sense of the "not in my backyard" phenomenon (Morris 2003), place obstacles in the path of the right to seek and obtain asylum, as outlined by the Inter-American Commission on Human Rights in the *Haitian Interdiction* case in 1996.[9] Canada maintains that it respects its international obligations toward the protection of refugees, but nothing in the Canadian government's interception and interdiction policies provides for an effective means of allowing migrants in real need of protection to come to Canada. Thirty-two percent of Canada's interceptions in 2000 were made in the migrant's country of origin or in countries that lack a refugee protection system comparable to Canada's (Crépeau and Jimenez 2004).

Canada currently has 45 migration integrity officers (MIOs) in 39 key locations overseas (DFAIT 2004). Australia, the Netherlands and Norway, however, send immigration officials abroad to train local airline staff at foreign airports to recognize fraudulent or incomplete documentation. The work of Canada's MIOs resulted in an interdiction rate of 72 percent in 2003. Although verification is next to impossible, this figure means that, according to DFAIT, of all attempted irregular entries by air, 72 percent (over 6,000 individuals) were stopped before they reached Canada. Since 1999, more than 40,000 people have been intercepted by the MIO network before they boarded planes for North America (DFAIT 2004; see also Canadian Embassy 2005).[10]

While preinspection regimes extend migration boundaries, some states have tried to declare parts of their airports "international zones" in order to deter asylum-seekers. This practice is based on the fiction that the foreigner has not yet been admitted into the country and is still in some kind of international no-man's-land. Established in areas accessible only to airport personnel, these zones are set up to "allow" officials to refuse asylum-seekers the protection available to those officially on state territory (for example, the right to legal representation or access to a review process), and to expedite their speedy removal from the country. Although such zones have been rejected in principle by domestic and international courts, the absence of external oversight makes what happens in these areas difficult to control (Crépeau 1995).[11]

The most radical development along these lines was the redefinition by the Australian government of the status of its island territories for immigration purposes. A 2001 act "excised" Christmas Island, Ashmore Reef, Cocos Island and other territories from Australia's "migration zone," so that, according to Australian law, the landing of asylum-seekers on these territories did not trigger the country's protection obligations. While Australia's obligations under international law, including the 1951 Refugee Convention, could not be changed by such a unilateral act, the protections associated with the country's domestic asylum laws (for example, the right to appeal a negative decision) were no longer available to individuals on these territories (Gibney and Colson 2005).

Going further, the US has used its military base at Guantanamo Bay, Cuba, to process Haitian and Cuban asylum-seekers in order to obviate the need to grant them the constitutional protections held by foreigners on US territory (Gibney and Colson 2005). In a similar vein, as one element of the "Pacific solution," Australia took "interdictees" to processing camps on islands in the Pacific (Nauru, Fiji, Papua New Guinea), which those countries accepted in exchange for millions of dollars in aid from the Australian government (Morris 2003).

Effectiveness and legitimacy

These preventive measures are very convenient for states. First, the extension of state enforcement mechanisms beyond state territory does not carry with it a *clear* obligation to ensure international protection for those who need it. Second, it is extremely difficult to control the actions of states overseas. By using extra-territorial mechanisms, states can pretend that they are free of the international and national legal constraints

and scrutiny they face when migrants arrive on their territory – migrants are "outside" rather than "inside," and thus they do not constitute a domestic political or legal problem anymore. And it is true that media, politicians, public opinion and even NGOs generally are not as attentive to what happens outside their nation's territory.

States are not, however, beyond the bounds of responsibility. The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001), which were developed over the course of 30 years by international jurists, provide that responsibility ultimately hinges on whether the relevant conduct can be attributed to that state and not whether it occurs within the territory of the state or outside it. The place where such an act occurs is thus simply not a relevant consideration, and there is today ample authority at the global and regional levels to support this argument (Lauterpacht and Bethlehem 2003, 110; Brouwer and Kumin 2003; Crawford 2002).

The UN Human Rights Committee, which authoritatively interprets the International Covenant on Civil and Political Rights, was extremely clear when it explained in its most recent general comment on article 2:

> [A] State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party...this principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peacekeeping or peace-enforcement operation. (UN Human Rights Committee 2004, para. 10)

This unambiguous view by the committee is reflected in its consistent position on Israel. Indeed, both the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights[33] hold Israel responsible under the covenants in the occupied territories, since Israel exercises "effective control" there.[34]

The extraterritorial applicability of human rights law is further underlined by the jurisprudence of regional human rights systems. The Inter-American Commission on Human Rights has considered that the American Declaration on Human Rights is applicable to acts of foreign forces – for example, during the occupation of Grenada, or, more recently, in the context of the detentions in Guantanamo Bay.[35] The European Court of Human Rights has also repeatedly determined that the protections afforded by the European Convention on Human Rights apply to all territories and people over which member states have effective control. Thus, in *Loizidou*, the court determined that Turkey was liable for breaching the European Convention on Human Rights for actions of the authorities in northern Cyprus, over which Turkey exercised "effective overall control."[36]

In domestic courts, decisions challenge the manner rather than the principle. For example, the US Supreme Court in *Rasul* held, in June 2004, that foreign nationals imprisoned without charge at Guantanamo were entitled to bring legal action challenging their captivity in US federal courts.[37] In December 2004, the UK House of Lords also held that a preclearance immigration control scheme at Prague airport, conducted pursuant to an agreement with the Czech Republic, constituted direct racial discrimination against Czech citizens of Romani origin in preventing them from travelling to the UK.[38]

Despite a growing recognition of state responsibility under international, regional and domestic law, one must note the paradox between the advent of preventive measures on the one hand, and the advance of a human rights culture on the other. In a context where politics push policies toward closure and restriction, but where the law inches unevenly toward greater respect for the human rights of foreigners, it is no wonder that Western states increasingly resort to nonarrival measures to insulate themselves from claims by migrants, especially asylum-seekers.

Deterrent measures

While preventive mechanisms directly impede the entry of migrants, deterrent measures operate more indirectly. These attempt to discourage asylum-seekers or irregular migrants from entering the country by making the cost of entry so high, or the benefits so low, that they do not attempt the journey. There is an obvious overlap in practice between preventive and deterrent measures, because many policies that successfully prevent entry also act to deter subsequent migrants from attempting to enter (Gibney and Hansen 2003). In brief, the deterrent policies focus on reducing the privileges and entitlements available to migrants in general and asylum-seekers in particular.

Elimination of appeals

Since the early 1990s, Canadian immigration law has undergone distinct changes, eliminating most forms of

appeal previously available to foreigners. These changes do not seem to have occurred to the same extent in other countries. Judicial review remains available in Canada, however. A rejected refugee claimant can apply to the federal courts, but only with leave from the court and essentially only on purely legal issues. Leave is rarely given, and the courts are not required to provide a reason when they deny leave. From 1998 to 2004, 89 percent of the applications to the federal courts for judicial review of refugee claim determinations were denied leave. If we compare the number of applications granted leave during this period (under 4,000), with the number of claims refused by the Immigration and Refugee Board during this period (just under 87,800), we find that only 4 percent of claimants have had the opportunity to have the decision against them reviewed by a federal court (CCR 2005b). Furthermore, when a claimant is granted leave by the court, factual mistakes will generally not be corrected since the court is not required to review the factual analysis unless that analysis is found to have been wholly unreasonable.[4] If the original decision-maker considered all the evidence in a reasonable way but reached the wrong conclusion, the court will not intervene. In this way, the management of immigration files is certainly made more efficient, but human rights protection has been radically diminished, as unanimously observed by the Inter-American Commission on Human Rights, UN Human Rights Committee and UN Committee Against Torture, respectively, in 2000, 2002 and 2004 (CCR 2005b). In 2001, the *IRPA* created the Refugee Appeal Division (RAD), where refugee determinations could be reviewed. This right to an appeal on the merits for refugee claimants was balanced by a reduction from two to one in the number of IRB members hearing a case. In 2002, the government implemented the new law without implementing the RAD, thus delaying indefinitely a migrant's right to appeal.

> The Canadian government is joining the ranks of Western governments which are using the political context created by 9/11 to renege on a general commitment to the rule of law. This fact is most marked in the area of immigration and refugee law. Canada is now in flagrant violation of one of the central pillars of the rule of law, the right of access to an independent court to test the legality of decisions affecting basic rights. Judicial review of such decisions is available, but only on leave, which is infrequently granted. That this is an inadequate safeguard has been recognised through a legislative promise to establish a Refugee Appeal Division, a promise which the government refuses to implement. In persisting with this refusal, the government exhibits the two-faced stance which is so depressingly common these days whereby governments maintain the facade of the rule of law without delivering its substance. (David Dyzenhaus, quoted in CCR 2005b, 3)

Reduced legal aid

Recently there have been cuts in legal aid for migrants in most host countries. In Australia, for example, legal aid in immigration matters has been substantially reduced over the last six years. In addition to the applicant being subjected to the means and merits test, legal aid assistance can only be granted in migration matters where (1) there are differences of judicial opinion that have not been settled by the full court of the Australian Federal Court or the Australian High Court, or (2) the proceedings seek to challenge the lawfulness of detention (Parliament of Australia 2004). In April 2004 in the UK, the Legal Services Commission introduced new funding arrangements for legal work on asylum and immigration issues, with the overall aim of reducing spending. The Department for Constitutional Affairs set out the rationale for the cuts, arguing that the system was an increasingly expensive "gravy train" for legal aid lawyers to carry out low-quality and unnecessary work on the cases of people who were not going to win the right to remain in the UK (Asylum Aid 2005).

In Canada, the refugee determination process, based on the Canadian Charter, is quasijudicial and each refugee claimant has the right to a hearing with full interpretation and the right to counsel (see discussion of *Singh*, above). However, it has never been deemed important in Canadian law and policy to provide sufficient legal aid to help migrants prepare their cases. Although the refugee determination system is under federal jurisdiction, legal aid in such matters has been left to the provincial legal aid regimes without ensuring adequate funding. In Ontario, the average legal aid fee for a refugee determination case is still over C$1,500. In Quebec, it is C$455, which represents three hours of work if an interpreter is not required. In Manitoba, there is no legal aid for migrant cases. If the mafia boss has a right to legal aid, shouldn't the provision of legal aid in refugee cases, where the consequences of an erroneous decision can be death, torture or prison, be treated as at least as important? (Crepeau and Jimenez 2004; Frecker et al. 2002).

Increased detention

Although Canada's detention practice is not as harsh as what can be seen in other countries, such as the United

States or Australia (the two countries automatically detain most illegal migrants).[9] immigration detention has increased considerably in the past years, essentially because the *IRPA* and its regulations provide the citizenship and immigration minister with stronger authority to arrest and detain people who pose a security risk and those whose identity is in doubt.

As stated in section 55(2) of the *IRPA*, a person may be detained if that person is (1) not likely to appear for an examination, an inquiry or removal, (2) likely to pose a danger to the public or (3) undocumented or improperly documented. While these grounds are the same as in the former legislative regime, the provisions that allow detention are broadened. First, foreign nationals (people other than Canadian citizens or permanent residents) can be detained at any point in the claim process for identity reasons, whereas in the past they could only be detained on the basis of identity at the port of entry. Second, under section 55(3) of the *IRPA*, immigration officers have wider powers to detain all foreign nationals and permanent residents at a port of entry (1) on the basis of administrative convenience (for example, to continue the interview) or (2) when they have "reasonable grounds to suspect" inadmissibility on the basis of security or human rights violations. Third, section 55(2) of the *IRPA* expands the provisions for detention of a foreign national *without a warrant* at any stage of the determination process and for any ground for detention. Whereas there were previously some limited circumstances in which foreign nationals within Canada could be arrested without a warrant, immigration officers are now authorized to arrest all people who are inadmissible, even if they are not about to be removed. The expansion of detention for lack of proper identity documentation is of particular concern. Those seeking asylum are often forced to leave their countries without proper identity documentation because it is precisely their identity that puts them at risk (Gauvreau and Williams 2002, 68). Moreover, one major criterion of detention in this context is the officer's "satisfaction" with the level of the migrant's "cooperation" in establishing his or her identity.[10] The utility of requesting that the asylum-seeker take all measures to establish his or her identity is, however, questionable because such cooperation is required as soon as people enter the country, when they are under a great deal of stress and, given their experience in their home country, may still have a high degree of distrust of public authorities. Moreover, asylum-seekers may not want to cooperate in establishing their identities because applying to the authorities of the home country for documentation may put family or colleagues still there at risk of persecution. Asylum-seekers are not compelled by the Canadian authorities to ask their embassies to provide them with identity documents, but they are *strongly urged* to do so, and the willingness to do so is viewed as clear evidence of cooperation. In such a context, how can one evaluate the noncollaboration of someone who is scared? How can one evaluate the lack of cooperation of someone who remains silent out of fear that his or her family still in the country of origin may be adversely affected if he or she does cooperate (Nakache 2002)?[11]

In addition to broader legal power to detain non-citizens, the government is making more use of the detention power. In the new budget allocations made by the federal government in December 2001, part of the funding for security included more money for immigration detention, the objective being to increase the number of people detained as well as the length of detention (DFAIT 2003). In 2003-04, 13,413 people were detained. This is an increase of 16 percent over the numbers for 2002-03 (11,503), of 40 percent over the numbers for 2001-02 (9,542), of 52 percent over the numbers for 2000-01 (8,786) and of 68 percent over the numbers for 1999-2000 (7,968) (CBSA 2004; CIC 2003). The number of detention days is not given by the newly established Canada Border Services Agency in its performance report, but we know from Citizenship and Immigraton Canada's 2003 performance report that, in 2002-03, noncitizens were in detention for a total of 165,070 days, which is a 17 percent increase in the number of detention days over the previous fiscal year (141,202) (CIC 2003). Despite security concerns, most of the money allocated to increased detention capacity is not being used to detain people considered threats to security; it is being used to respond to the increase in the detention of migrants with no adequate identification. From June to December 2003, for example, 56 percent of detentions were on grounds of flight risk, 10 percent because of a lack of satisfactory identity documents and only 1 percent on security grounds (Dench 2004). CIC has also tried other detention practices. For example, it has employed private security companies to implement deportation orders. In one such case, a security company kept one person in detention in several successive countries for several weeks, without any authority to do so, before using

forged documents to return the person to a country that may not even have been the person's country of origin (Crépeau and Jimenez 2004).

Excessive penalties for migrant smuggling

Trafficking in people and migrant smuggling must be distinguished from one another. Despite the human rights concerns associated with smuggling and trafficking, it is actually law enforcement concerns (the war against terror, organized crime and irregular migration) that have moved this issue up on the international policy agenda. In 2000, two new protocols to the Convention against Transnational Organized Crime were drafted, dealing with trafficking and smuggling, respectively. The trafficking and the smuggling protocols are framed on a central distinction between coerced and consensual irregular migrants. While people who are trafficked (and end up in forced labour or prostitution) are assumed not to have given their consent and are thus considered to be "victims," migrants who are smuggled are considered to have willingly engaged in the enterprise (Bhabha 2005). In other words, a person who is trafficked is kept under the control of the traffickers, whereas a migrant-smuggler simply facilitates the migrant's clandestine entry into a country. It is easy to forget, however, that many irregular migrants, even those who are smuggled, need protection against human rights violations in their country and should not therefore be considered simply criminals, since they did only what many of us would do in similar circumstances: try to find the best way to protect themselves and their families. And even if they might have technically broken the immigration laws of the host country, they retain certain rights and freedoms under the rule of law.

Although the two Palermo protocols stipulate that the migrants themselves should not be subject to criminal prosecution because of their illegal entry, the protocols require state parties to criminalize the conduct of traffickers or smugglers and to cooperate with other states to strengthen international prevention and punishment of these activities (Bhabha 2005). These protocols were ratified by Canada in May 2002. The new *IRPA* consequently modified the penalty for migrant smuggling. The new Act imposes tougher maximum penalties for organizing irregular entry into Canada. For example, helping 10 individuals or more to cross the border irregularly, without any threat to persons or property (that is, not trafficking in people for slavery or prostitution purposes), is an offence punishable by life imprisonment. This is more than the punishment for rape at gunpoint, which carries a maximum sentence of 14 years, and it is the same as that imposed for acts of genocide or crimes against humanity. This is also much more than the legislation of other host countries, where the criminal penalties are a maximum of 5 to 10 years of imprisonment (US State Department 2004, 115; see also European Union 2002). Last, but not least, the Canadian legislation does not distinguish between people who are motivated by humanitarian concerns and others. Contrary to the Smuggling Protocol, the *IRPA* does require remuneration or a benefit. Thus, someone who helps a family member flee persecution can be refused an asylum hearing or lose permanent residence without the possibility of appeal (Crépeau and Jimenez 2004). The deterrent effect of such grossly exaggerated penalties is doubtful, especially when, because of the "Western fortress," most irregular migrants and most asylum-seekers must use help of some kind to enter Western countries for any reason (Morrison and Crosland 2001).

The Canada-US Safe Third Country Agreement

In December 2002, Canada and the US signed a safe third country agreement, which came into force in December 2004. This agreement allows each country to send back all the asylum-seekers who have reached its territory by way of the other. The rule applies only at a land port of entry; it does not apply to claims made at an airport, port or ferry landing (even by those coming from the US) or to claims made inside Canada. Figures provided by Citizenship and Immigration Canada (CIC) indicate that from 1995 to 2001, approximately one-third of all refugee claims in Canada (31 percent to 37 percent annually) were made by claimants known to have arrived from or through the US. Concretely, the agreement is expected to severely reduce the numbers of the now approximately 15,000 refugee claimants who arrive yearly in Canada from the United States (see Canada 2002; Manley 2001; US Committee for Refugees and Immigrants 2003).

Many nongovernmental organizations in Canada as well as the United Nations High Commission for Refugees have questioned the basic premise that the US is a safe country for all asylum-seekers. Although both the US and Canada are signatories to the 1951 Refugee Convention and the Refugee Protocol, certain US practices are of great concern: detention procedures, the expedited removal process (which excludes a full hearing of the claim and does not provide adequate procedural guarantees against refoulement or

return to the country where there is a risk of persecution or torture), the one-year time limit to file a claim in the US, the more restrictive definition of refugee than that used in Canadian case law (especially regarding gender-based persecution), and so on. The difference between the practices of the two states is most striking on the issue of the detention of children for immigration-related reasons. The United States routinely detains unaccompanied minors who lack legal status in the US and may be asylum-seekers, whereas in Canada they are protected according to their "best interest," as stated in *Baker*. This practice has been widely criticized by US and international human rights organizations (Macklin 2003). It is also very difficult for asylum-seekers to prove that they meet the exceptions to the safe third country rule (family reunification, unaccompanied minors, nationals of a country to which Canada has temporarily suspended removals, and so on), in circumstances where documentation is scarce (Macklin 2003).

Last, but not least, the safe third country agreement will probably create a lucrative market for smugglers, who transport asylum-seekers across the border illegally. This is exactly what happened in Europe with the implementation of the safe third country provisions in the 1990 Dublin Convention. A study of the implementation of that convention, funded by the European Commission and carried out by the Danish Refugee Council, revealed, *inter alia*, that the "Dublin system" gave refugee claimants incentive to destroy identity and travel documents and to choose illegality and go underground in order to avoid transfer to a country where their claims might be dealt with less favourably. The EU ultimately recognized in that study that the "Dublin system" did not function as expected (Danish Refugee Council 2001). The fact that the safe third country agreement may create a huge market for migrant smugglers will further degrade the image of asylum-seekers, in effect turning them in the court of public opinion into menacing international criminals. Harsher repressive or deterrent measures against migrants will then be easier for governments to justify.

In conclusion, as a result of the recent multiplication of restrictive migration policies, the vulnerability of migrants has increased and their rights have unquestionably been reduced at all stages of the migration process. This erosion of the rights of foreigners is common to all receiving countries. Canada is probably better protected from from irregular flows of migrants than most comparable countries, considering its relative geographical isolation and the fact that it is also somewhat less likely to enact the harshest measures because of the role played by the Canadian Charter. However, the more recent international security agenda has only reinforced pre-existing restrictive tendencies.

Migrants, Security and Human Rights

After 9/11, the fear of terrorism led to the adoption of antiterrorist measures and the reinforcement of the security-related policy apparatus in Canada and elsewhere. On October 12, 2001, the minister of citizenship and immigration announced immigration measures to be integrated in the new antiterrorist strategy. The funds to be allocated to this antiterrorism plan between 2001 and 2007 were estimated at C$7.7 billion (CIC 2001; Office of the Auditor General of Canada 2003). In December 2003, the prime minister created the Public Safety and Emergency Preparedness (PSEPC) portfolio, essentially Canada's equivalent to the American Department of Homeland Security (DHS). PSEPC is designed to coordinate policy, break down organizational bottlenecks and bring a stronger national security focus to the operations of key agencies, including the Royal Canadian Mounted Police (RCMP), the Canadian Security Intelligence Service (CSIS), the Canada Firearms Centre (CFC), Correctional Service Canada (CSC), the National Parole Board (NPB) and the Canada Border Services Agency (CBSA). The CBSA is a new agency in charge of the border control functions of several departments (including Citizenship and Immigration Canada). It is responsible for conducting intelligence screening of visitors, refugees and immigrants and for deporting people. PSEPC has a total annual budget of C$4.9 billion and employs more than 52,000 people (the DHS's budget is US$41.1 billion and it employs around 183,000 people, which represents a doubling of its funding since 2001) (White House 2006; Canadian Embassy 2005). This new department is thus in charge of implementing the Smart Border Action Plan, as well as the security measures included in the *IRPA*.

Canada-US immigration cooperation: the Smart Border Action Plan

After 9/11, there were widespread charges that the Canadian border control system was porous and inefficient. A poll showed that 80 percent of Canadians demanded stricter controls over immigration (Adelman 2002, 2). However, on November 28, 2001, Minister of Foreign Affairs John Manley mentioned that in 2000, some 14,000 criminals were stopped from entering the US from Canada, whereas some 21,000 – 50 percent more – were stopped trying to come to Canada from the US (it should be noted, however, that the definition of "criminal" is not entirely clear and may include any irregular migrant). Manley also remarked that a significant proportion of the refugee claimants in Canada entered from the US and that most of the guns used in crimes in Canada were imported illegally from the US (Manley 2001). Furthermore, according to a report released by the House of Commons Standing Committee on Citizenship and Immigration:

> [T]he attacks of September 11th were largely orchestrated and carried out by a group of people who entered the United States legally and had nothing to do with individuals attempting to enter Canada to win status as refugees...Canada is not a haven for terrorists. (Canada 2001)

What can be drawn from these conclusions, later confirmed by the 9/11 Commission (US National Commission 2004), is that security at the border may need to be improved, but it is unfair to represent the migration control system as porous or as a security threat justifying stricter controls on the entry of refugees to Canada.

The US and Canada have perhaps the most extensive bilateral relationship in the world, with US$1.4 billion in goods and services exchanged daily and some 200 million people crossing the border each year. The two countries have cooperated on trade and defence since Confederation. Immigration cooperation is hardly new, since the two countries signed the US-Canada Shared Border Accord 10 years ago.[15] What is new, however, is the US desire to achieve unprecedented levels of control over migration flows. Given the clear tension between strong economic interests in favour of openness and strong security interests favouring restrictiveness, policy-makers have increasingly argued that the only solution is to create "smart borders." Secretary for Homeland Security Tom Ridge made this point clear: "We're working with Canada and Mexico to institute smart borders that will keep terrorists out, while letting the flow of commerce in" (Rudolph 2004). Thus, on December 12, 2001, Canada and the United States signed the Smart Border Agreement and its companion [illegible] point action plan.[16] The action plan outlines several ways in which these immigration-related commitments will be implemented:

- Develop common biometric identifiers
- Deploy securitized permanent residents' cards
- Increase security screening within refugee/asylum processing and exchange information
- Negotiate a safe third country agreement
- Coordinate visa policy
- Share advance passenger information and agreed-to passenger name records on flights between Canada and the US
- Establish joint passenger analysis units at key international airports in Canada and the US
- Develop compatible immigration databases
- Increase the number of Canadian and US immigration officers at airports overseas
- Undertake technical assistance to source and transit countries

Many of these measures are perfectly understandable improvements on previous practice. However, it is clear that they do not aim at protecting foreigners better, especially refugees. On the contrary, efficient border management includes making sure that fewer persons will be able to reach the border and ask for protection. No provision is made in these instruments for more fully fledged implementation of the 1951 Refugee Convention or other human rights obligations (Crepeau and Jimenez 2004). The provisions relating to the communication of passenger information and to biometrics illustrate this particularly well.

Communication of passenger information

In November 2001, US President Bush signed a bill making it mandatory for foreign airlines to communicate to American authorities the lists of their passengers, as well as certain additional information. Since January 2002, the US has refused landing to planes when this information has not been duly transmitted. In December 2001, the Canadian House of Commons gave effect to the requirements of this controversial legislation in an amendment to the *Aeronautics Act*.[17] In October 2002, Canada implemented its passenger information system (PAXIS) at Canadian airports to enable it to collect advance passenger information on individuals travelling to Canada, and in July 2003 it began implementing the passenger name record (PNR) component of PAXIS. Work is underway to develop an automated

process enabling Canada and the United States to exchange immigration data, which was scheduled to be implemented in 2005 (DFAIT 2004). Canada's privacy commissioner strongly denounced this measure: first, because foreign governments could use the extensive information (30 data elements, including where and with whom a passenger is travelling, the method of payment for tickets, contact addresses and telephone numbers, even dietary and health-related requirements communicated to the airlines) as they wished; second, because all this information is available for a virtually unlimited range of governmental and law enforcement purposes. In April 2003, the commissioner acknowledged that the minister of national revenue had brought about important changes to the previous provisions, including better guarantees for privacy:

> [I]t would have been preferable, from a privacy perspective, not to have this database at all or to have it absolutely restricted to anti-terrorism purposes. But the changes announced by Minister Caplan strike a fair and reasonable balance between the responsibilities of CCRA [Canada Customs and Revenue Agency], particularly with regard to maintaining border security against terrorism, and the privacy rights of Canadians.[14]

The EU and Canada have recently signed a similar agreement.[15]

Biometrics

In recent years, heightened security concerns arising from the growth of transnational crime and terrorism have led to increased interest and research into biometric technologies' potential to make accurate identity checks. Long used in the realm of criminal proceedings and in the private sector, biometrics has received a great deal of attention as a way of filling the gaps in traditional methods of border control. Biometrics consists of the use of physiological or behavioural characteristics to recognize or verify the identity of a living person. *Physiological characteristics* include fingerprints, hand geometry, iris shape, face, voice, ear shape and body odour. *Behavioural characteristics* include handwriting and the way a person walks (Thomas 2005). Canada and the United States have agreed to develop common standards for the biometrics used in travel documents; they also have agreed to adopt interoperable and compatible technology to read these biometrics. Border authorities in both the European Union and North America have opted for inkless fingerprints and digital facial recognition through digitized photographs. Iris recognition technology has been identified for secondary use (DFAIT 2004).

There are important human rights implications in the collection, processing and distribution of a person's unique physical identifiers, which causes a certain degree of friction between the security interests of policy-makers and the right to privacy of those subject to any of these measures (Thomas 2005). But from a migrant's perspective, the situation has worsened: the development of biometric technology is considered to be discriminatory, and it may also be traumatic. Past experience shows, for example, that several pilot projects have targeted narrow and specific groups of migrants. The United Kingdom's visa registration project targeted visa applicants from five East African countries, as well as asylum-seekers. The American Student and Exchange Visitor Information and National Security Entry-Exit System programs were aimed at foreign students and Arab-Muslim travellers, respectively. In brief, because of the unavoidable consequence of their contact with borders and because of terrorism fears, certain nationals and ethnic groups are deliberately targeted by immigration controls. In addition to the discrimination, people fleeing their countries for fear of persecution may experience such a procedure as very traumatic (Thomas 2005).

Security cooperation rather than integration

Whereas the Canadian House of Commons report – entitled "Hands across the Border" and written in the immediate aftermath of 9/11 – recommended cooperation with the US rather than security integration, a recent trinational report of the Independent Task Force on the Future of North America suggests the contrary. The task force, headed by former Canadian foreign minister John Manley, former Massachusetts governor William Weld and former Mexican finance minister Pedro Aspe, was launched in October 2004. It is jointly sponsored by the US Council on Foreign Relations, the Canadian Council of Chief Executives and the Mexican Council on Foreign Relations. In March 2005, the leaders of Canada, Mexico and the United States underscored the deep ties and shared principles of the three countries through the adoption of the Security and Prosperity Partnership of North America. In May 2005, they released a report calling for the creation of a contiguous external security perimeter and a common "security zone" by 2010, with specific recommendations on how to achieve it (Council on Foreign Relations 2005).[16]

The objective is clearly to reinforce previous moves aimed at facilitating faster movement of goods and people, while reinforcing security around the three countries. Assuming that security integration is taking place, despite Canada's refusal to join the American antimissile program, the consequences of this integration in terms of migration and refugee policy are extremely worrying. The trinational report recommends the development of unified visa and refugee regulations by 2010. If Canada and the United States have already enhanced their cooperation on visa policy, their immigration and refugee policies do in fact diverge. For example, although the difference in the quality of protection offered by each country largely depends on the circumstances of each claimant, there are more restrictive rules and a narrower definition of "refugee" in the US than in Canada. Canada adjudicates refugee claims according to a rule that gives the benefit of the doubt to the claimant, while Americans adjudicate on the balance of probabilities; detention of migrants is much more frequent and harsh (often in state prisons with convicted criminals) in the United States; protection of minors is much more of a preoccupation in Canada; Canada has never had the equivalent of the Guantanamo processing centre for Haitian refugees. Recently, the rules diverged even further when the US passed the *Real ID Act of 2005*, which allows judges to base credibility determinations on the applicant's demeanour, responsiveness or inconsistency with any statement made at any time to anyone, and it permits denial of asylum or protection from removal where there is a lack of documentary or "corroborating" evidence in support of the applicant's case, even if the applicant presents specific, detailed and credible testimony.[9]

To conclude, the necessary harmonization of security policies between the US and Canada, although it undoubtedly affects the immigration and refugee policies of each country, should not lead to a harmonization of immigration and refugee policies based on the lowest common denominator. Driven as much by its international commitments as by its Charter obligations, Canada must be able to keep its ability to set policy in these areas and to maintain its internationally recognized position as a country with a good working model in terms of refugee status determination and migrant protection generally.

National security measures in the *Immigration and Refugee Protection Act*

The introduction of counterterrorism legislation is included as an objective in the Smart Border Action Plan. As a result, President Bush signed the *USA PATRIOT Act* in October 2001, and in Canada the *Anti-terrorism Act* came into force in December 2001.[10] In 2003, a counterterrorism subgroup was created under the auspices of the US-Canada Cross-Border Crime Forum (DFAIT 2004). The antiterrorism legislation creates measures to identify, prosecute, convict and punish terrorist groups and provides new investigative tools for law enforcement and national security agencies. Its impact on the human rights of migrants needs to be clearly assessed, but it has been of little effect until now.

> One of the reasons why Canada's new anti-terrorism legislation has largely sat on the shelf is that Canadian authorities have focussed on using immigration law as a means to detain suspected international terrorists. Although the [*Anti-terrorism Act*] departs from some traditional criminal law principles, it still has requirements such as proof beyond a reasonable doubt of a prohibited act with fault, a three day limit on preventive arrest and the ability of trial judges to stay proceedings if secret evidence will result in an unfair trial. In contrast, the administrative law apparatus of the Immigration and Refugee Protection Act allows preventive detention and the removal of noncitizens on the basis of secret evidence not disclosed to the deportee. (Roach 2005, 2)

Thus the *IRPA* can be seen as one of the legislative responses to 9/11. In effect, "immigration law has been attractive to the authorities because it allows procedural shortcuts and a degree of secrecy that would not be tolerated under even an expanded criminal law," and it has therefore been "the focus of Canada's antiterrorism efforts" (Roach 2005). And it is ironic that the *IRPA* has been criticized in the US Library of Congress report because the reference to refugee protection in its title is "an indication of the prevailing concern for or priority placed upon civil liberties in Canada" (Berry et al. 2003, 147; Roach 2005).

The expansion of security-based inadmissibility grounds

In 2002, the *IRPA* expanded the inadmissibility categories to permit refusal of entry on the basis, *inter alia*, of security (s. 34), serious criminality (s. 36) and organized criminality (s. 37). According to section 34, permanent residents and foreign nationals can be ruled inadmissible to Canada for espionage or subversion against a democratic government, institution or process; subversion by force of any government; terrorism; posing a danger to

the security of Canada; acts of violence that could endanger the lives or safety of persons in Canada; or membership in an organization reasonably believed to engage in (whether in the past, present or future) espionage, subversion or terrorism.

Under the *IRPA*, if security issues arise at any stage of the refugee determination process the claim for refugee status will either be found ineligible for referral to the Immigration and Refugee Board or suspended. Moreover, the *IRPA* removed the power to review removal orders against any person, even a permanent resident, who is inadmissible on the grounds of security, violating human or international rights, serious criminality and organized criminality.

The inadmissibility classes relating to security risks are extremely contentious, in terms of both definition and implementation:

- Their definition is very vague and subject to a wide array of interpretations.
- They rest on evidence taken from unverifiable security intelligence sources.
- They depend in the end on opinion rather than on fact.
- They deal with matters of international politics.

Although there are, since the *Anti-terrorism Act of 2001*, definitions for "terrorist activities" and "terrorist group" in the Criminal Code, neither the *IRPA* nor the corresponding immigration regulations actually define "terrorism," though it nevertheless remains a ground for inadmissibility (Crépeau and Jimenez 2004). In any event, terrorism need not be defined or proven if the foreigners are deemed a "danger to the security of Canada," a phrase that the Supreme Court, in *Suresh*, seems to allow a broad degree of interpretation.[13] Even though being member of a terrorist group is not a crime under the *Anti-terrorism Act*, it constitutes grounds for inadmissibility under the *IRPA*. In both cases, "being a danger" or "being a member" need not be proven "beyond a reasonable doubt," as they would be in the criminal justice system. They need only be proven on the balance of probabilities – that is, on the basis of a bona fide belief in a serious possibility based on credible evidence.[14]

Thus, the *IRPA* allows Canadian authorities to treat foreigners in ways the Criminal Code would not permit.

Detention of suspects

Compared to the *Anti-terrorism Act*, the *IRPA* provides for much broader powers to arrest and detain foreigners on security grounds. Under the *IRPA*, preventive detention can go well beyond the 72 hours provided for in the *Anti-terrorism Act*; the review is made not by a judge, but by an official of the Immigration Division of the IRB; the continuation of the detention can be based on the ground that "the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights" (s. 58(1)(*c*)); this preventive detention without charge can continue for an indefinite period, with a review every 30 days.

This power to arrest and detain a foreigner without a warrant where an officer has "reasonable grounds to suspect" (s. 55(3)(*b*)) that the foreigner is "inadmissible on grounds of security" (s. 34(1)) is very problematic. The normal level of evidence in such matters is that the officer must "believe on reasonable grounds" that a criminal activity will be committed. How low is the threshold of the "suspicion on reasonable grounds," as compared to that of "belief on reasonable grounds"? How would a court identify a suspicion based on "unreasonable grounds"? These questions remain only partially answered in Canadian law and policy. Following a lead given by the Supreme Court of Canada on customs issues in *Jacques*,[15] Citizenship and Immigration Canada has differentiated the two standards:

> Reasonable grounds [to believe] are a set of facts and circumstances that would convince a normally prudent and informed person. They are not mere suspicions. The opinion must have an objective basis.
>
> Reasonable grounds to suspect, a lower standard than to believe, is a set of facts or circumstances that would [lead] the ordinarily cautious and prudent person to have a hunch or suspicion. (CIC 2005, 17)

Contrary to what might be true in most customs cases, the dramatic consequences for the individual of the adoption of a "suspicion on reasonable grounds" standard in immigration cases have already been amply illustrated. During the summer of 2003, some 20 people, most of them Pakistani or Indian citizens studying in Canada, were arrested without a warrant, with a sensationalist news release suggesting they might constitute a sleeper cell for al-Qaeda. This suggestion was based on such information as their being registered in a flying school, being registered in a then-defunct business school, having two different residential addresses in order to avoid paying higher auto insurance premiums, and having documents on the dimensions of the CN Tower in Toronto. No charges were ever pressed. Most of the detainees were released on bail after a few months. The Immigration and Refugee Board member

who authorized their release noted that the activities deemed suspect were not special or unusual among potential new immigrants (Canadian Council for Refugees 2003).

Security certificates

Security certificates, as an instrument for removing permanent residents and foreign nationals who pose a threat to the security of Canada, have been available under Canadian immigration legislation since 1991. The *IRPA* strengthens the security certificate process, including suspension or termination of a claim for protection, broader provisions on organized crime, elimination of appeals and streamlining the removal process (Crepeau and Jimenez 2004).

According to the *IRPA*, a certificate must be signed by both the minister of public safety and emergency preparedness and the minister of citizenship and immigration (s. 77). The decision to sign a security certificate is based on either a security intelligence report issued by CSIS or a criminal intelligence report issued by the RCMP.[7] Once signed, a security certificate is referred to the federal court for judicial review, but it pre-empts all other immigration proceedings, including applications for refugee status; these proceedings are suspended until the federal court makes a decision on the certificate. The procedure adopted by the federal court for reviewing security certificates is extraordinary under section 78 of the *IRPA* because it involves the judge being required to hear the evidence in private and in the absence of the person named in the certificate or their counsel. The judge hears the evidence and information in private "to protect national security or the safety of any person." Such information can be used by the judge to determine the reasonableness of the certificate, but it cannot even be included in a summary of other evidence that can be provided to the person named in the certificate.[8] The Supreme Court of Canada upheld a somewhat similar procedure in the earlier immigration legislation but stressed the importance of providing at least a summary of the evidence to the person named in the certificate.[9] The judge will also hear evidence and testimony from the person named in the certificate, but this person and her lawyer will not have access to the reasons that are at the basis of the certificate. Somewhat similar procedures are available under the *Anti-terrorism Act* with respect to preserving the confidentiality of information obtained in confidence from a foreign entity or for protecting national defence or national security. The criminal trial judge has the right, however, to make any order, including a stay of the entire criminal proceedings, that he or she "considers appropriate in the circumstances to protect the right of the accused to a fair trial" (s. 38[14]). Such orders are not contemplated under Canadian immigration law. Indeed, if the judge upholds the security certificate as reasonable, the person named is subject to removal without appeal and without being eligible to make a claim for refugee protection. If the judge determines that the certificate is unreasonable, the certificate is quashed (s. 81) (Roach 2005).

The breach of traditional standards of due process and adjudicative fairness in the name of national security was acknowledged by a judge of the federal court:

> We do not like this process of having to sit alone hearing only one party and looking at the materials produced by only one party and having to try to figure out for ourselves what is wrong with the case that is being presented before us and having to try for ourselves to see how witnesses that appear before us ought to be cross-examined. (Hugessen 2002)

The judge ended his speech by suggesting a more proportionate alternative to the present system, one based on the British system of allowing lawyers with security clearances to have access to confidential information and play the role of the defence lawyer for the individual in the national security context. Unfortunately, this suggestion has not yet been taken into consideration (Roach 2005).

Foreign nationals who are the subject of a security certificate are automatically detained until the certificate has been reviewed by the judge. Permanent residents may also be detained if there are reasonable grounds to believe that they are "a danger to national security or the safety of any person or unlikely to appear at a proceeding or for removal" (*IRPA*, ss. 82-4). The detention warrant is subject to a judicial review under subsection 83(1) within 48 hours of the initial detention and is subject to a mandatory review every six months thereafter under subsection 83(2). There is no limit on the time that a person subject to a security certificate may be detained. During the review of the deportee's detention, the judge may hear evidence in the absence of the deportee, refuse disclosure of information to the deportee, deny cross-examination and rely on evidence that would otherwise not be admissible. Lastly, there are no provisions for release comparable to section 515 of the Criminal Code, which allows for the release of even the most dangerous individuals on surety bail or cash deposit. *Jaballah*'s example is instructive: he was denied interim release notwithstanding the fact that 14 individuals were prepared to act as sureties.[10]

The security certificate process provides the person subject to a security certificate with the option of initiating, at any point prior to a finding by a federal court judge that the security certificate is reasonable, an "application for protection" (*IRPA*, s. 112[1]). This application is on the basis that he or she is a "person in need of protection" – that is, a person who, if returned to his or her country of nationality or former habitual residence, would face a substantial risk of death, torture, or cruel and unusual treatment or punishment. However, even if the minister finds that the person will face a risk of death or torture, the application for protection may be refused under "exceptional circumstances."[59] The Canadian courts have also refused to stay deportations to allow United Nations committees such as the Human Rights Committee and the UN Committee against Torture to hear complaints that individuals would be tortured if deported from Canada (Roach 2004).[60]

To conclude, security certificates initiate a quasi-judicial process that reduces considerably the procedural safeguards guaranteed by the Canadian Charter, including the right to disclosure of the case, the right to confront and cross-examine one's accusers, the right to a public proceeding and the right of appeal. Deportees are also subject to lengthy terms of pre-removal incarceration and might face torture or inhuman treatment in their destination country. To date, however, the courts have upheld the process on the basis that detainees held under the *IRPA* are entitled to a diminished level of Charter protection. In *Ahani*, and more recently in *Charkaoui*, the federal court stated indeed that the rights of noncitizens who do not have an unqualified right to enter or remain in the country must be balanced against national security issues, such as the prevention of terrorism and the protection of informants, in favour of the latter.[61] In September 2005, the Supreme Court of Canada granted Mr. Charkaoui the permission to appeal.

The measures taken by Canada (as well as most other major receiving countries) in its fight against unwanted migration, combined with intrusive new technologies, are a threat to the security and the privacy of the noncitizen. These powers are not necessarily recent, but in the past they were either temporary or exceptional and in any event would be subject to the zealous supervision of the courts. What is new is their amplification and the related attempt to limit the supervisory jurisdiction of the courts.

These measures have received a new legitimizing discourse since 9/11. For instance, Canada's then-minister of justice, Anne McLellan, defended the new antiterrorism laws by insisting that they would be "Charter-proof" – a point that could prove true in light of the recent deferential posture of the Supreme Court of Canada. This combination of new powers and limited judicial review suggests that we may be in the midst of a fundamental shift in criminal and constitutional law from a paradigm of liberty to a paradigm of security (Ramraj 2002).

This shift could not be better exemplified than by the plight of Maher Arar. It has recently been discovered that the Canadian Security Intelligence Service approved of the American decision to send Mr. Arar to Syria – without the foreign minister being informed – and rejected any idea of his repatriation of to Canada, for the reason that, under the Canadian Charter principles, there wasn't enough evidence to detain Mr. Arar, and it was therefore "much better," for intelligence-gathering purposes, to keep interrogating him in Syria (Den Tandt and Laghi 2005). This twisted reasoning shows clearly what is at stake here: the rule of law is considered a nuisance when it comes to security issues, and using migration tools in such cases can help lower rule-of-law standards. The only reason the Arar case made the headlines is because Arar is a Canadian citizen. We may draw several conclusions from this. First, he would probably never have been deported had he been called Smith or Tremblay. In that sense, he was treated as if he were a foreigner. Second, it is a good thing that we care enough about the fate of Canadian citizens that a citizen's ordeal attracts attention when a public inquiry tries to uncover what really happened. Third, it is sad that the similar fate of numerous foreigners does not attract the same media attention. Fourth, it seems essential to place better legal checks on the security services and require full accountability from them in situations where a person's rights and freedoms may be at stake. The risk of costly blunders is just too high.

State migration controls lead to several paradoxical effects on human rights. First, while governments may finance campaigns against racism and xenophobia, they simultaneously act in a contradictory fashion by instituting – often in full view of the media – harsher treatment for irregular migrants, increased policing and other policies that act to restrict migrants' rights. Second, it seems to have become crucial for governments to keep out of their territories those who, in fact, could make legitimate and successful claims for asylum. Third, forced migrants coming from "refugee-producing" countries can no longer realistically hope to legally enter the territory of the countries whose

protection they are seeking. This, of course, further increases the perception held by the citizens of Western countries that the majority of asylum-seekers are bogus, that they are actually economic migrants. This brings us to the ultimate paradox: humankind has largely enshrined human rights, but, at the practical level, those who are being denied these rights in their home countries are simultaneously prevented by potential host countries from moving there and receiving protection there.

Conclusion: The Right to Equality and the Role of the Judiciary

What can be done? There is no clear-cut answer to such a question, but the solution is definitely to ensure that states' security measures duly respect their obligations regarding the fundamental rights of all – including migrants – since protection of these rights has become the overarching legitimacy test for all government action.

One key element is to recognize that the principle of territorial sovereignty cannot justify unlimited violations of individuals' rights and freedoms that are based on nationality. In other words, territorial sovereignty has to be conceived in a way that is compatible with existing international and national human rights regimes. It is essential therefore to recognize and clarify the rights of noncitizens in the state sovereignty context. Unfortunately, too often, for most politicians as for public opinion in these troubled times, "laws that arouse deep concern about civil liberties when applied to citizens are standard fare in the immigration context" (Macklin 2001, 11). It need not be so.

A closer look at the nondiscrimination standard will show how foreigners ought to be treated in free and democratic societies. International human rights treaties prohibit discrimination and permit only reasonable and proportionate differences in treatment, but state security measures often specifically target migrants as they are perceived to pose more of a security risk than citizens. It is therefore important to clearly identify and justify all security exceptions that are made to the normally acceptable state response to migration.

In human rights law, security exceptions are explicit and take two forms: limitation clauses and derogation clauses. Limitation clauses restrict a particular right. The International Covenant on Civil and Political Rights is typical in allowing certain rights to be subjected to restrictions so long as the restrictions are "provided by law...necessary to protect national security, public order, public health or morals or the rights and freedoms of others" (art. 12). In a context of security and public order, such limitation clauses should be construed *narrowly*:

> In other words, "to be provided by law," a restriction must not be purely administrative or executive, but rather must have a clear legislative origin. To be "necessary," a restriction must be narrowly tailored and proportional to the interest addressed. "National security" in this context is reduced to protection of territorial integrity against foreign threats of force concerning the entire nation. However, "public order," derived from the French doctrine of "ordre public" is much broader, encompassing the full police powers of the state to ensure the orderly functioning of society. (Martin, Fisher and Schoenholtz 2003, 100)

The International Covenant on Civil and Political Rights (art. 4), the European Convention on Human Rights (art. 15) and the American Convention on Human Rights (art. 27) also include derogation clauses allowing many of the rights protected to be abrogated in exceptional circumstances (UN Human Rights Committee 1986, 140). In the International Covenant on Civil and Political Rights and the European Convention on Human Rights, derogation requires an officially proclaimed "public emergency" that "threatens the life of the nation." Although none of the human rights instruments or treaty monitoring bodies has developed a catalogue of the situations that qualify as a "public emergency," this was intended to be an extremely difficult burden to meet. Article 4 of the International Covenant on Civil and Political Rights requires indeed that any derogation be applied (1) only "to the extent strictly required by the exigencies of the situation," (2) consistent with the state's other obligations under international law and (3) without "discrimination solely on the ground of race, colour, sex, language, religion or social origin." The Human Rights Committee's approach to state reports has also indicated that it believes that derogation under article 4 must be temporary, subject to some sort of parliamentary and judicial control, and responsive to an apparent violent situation that cannot otherwise be controlled, above and beyond mere social unrest (Martin, Fisher and Schoenholtz 2003, 98). In conclusion, even in situations threatening the life of the nation, a state must still demonstrate that any derogation of a particular right is justified in scope and duration by the specific circumstances it is facing.

Nondiscrimination provisions are not subject to specific limitation clauses for reasons of security, and derogation clauses prohibit a suspension of rights in a discriminatory manner. However, according to the general doctrine of nondiscrimination that has emerged in the case law of human rights treaty bodies, differential treatment is permissible where the distinction is made pursuant to a legitimate aim, has an objective justification, and reasonable proportionality exists between the means employed and the aims. Otherwise, the differentiation constitutes discrimination and is illegal (Clark and Niessan 1998; Fitzpatrick 2003; Martin, Fisher and Schoenholtz 2003). Moreover, the equality principle requires that migrants *never* be deprived of basic protections of physical security and fair trial, and consequently selective denial of those protections would never be reasonable or proportionate (Fitzpatrick 2003).

The standard against discrimination has not yet been applied to impose demanding requirements in evaluating states' grounds for admission and expulsion of migrants. This may change in the future, since the Committee on the Elimination of Racial Discrimination adopted General Recommendation 30, "Discrimination against Noncitizens," in August 2004. This recommendation clarifies general principles for responsibilities of states parties to the convention vis-a-vis noncitizens and deals in particular with issues of protection against hate speech and racial violence; administration of justice; expulsion and deportation of noncitizens; and economic, social and cultural rights. It recommends that states parties "ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that noncitizens are not subjected to racial or ethnic profiling or stereotyping" (UN Committee on the Elimination of Racial Discrimination 2004, para. 10). It also stipulates: "Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim" (para. 4). It is thus possible to provide some restrictions on states' actions in the immigration realm by imposing on states the following general guidelines:

- There is no possible differentiation between citizens and noncitizens regarding basic protections for physical security and fair trial.
- A differentiation between citizens and noncitizens is legal if a state can make out a "reasonable and objective case" that differing treatment of applicants of a particular national origin is required for its security (Martin, Fisher and Schoenholtz 2003).

This, of course, implies some supervision by national courts and international treaty bodies. In Canada, most of the new security measures introduced since 2001 have yet to be tested in the Supreme Court. But the decisions taken at a lower level to date show a judiciary that is ready to recognize a large margin of deference toward the national government on security issues. The UN Committee against Torture has been more stringent in its recent criticism of Canada's antiterrorist measures, and we can hope that this important voice will be echoed by the Canadian judiciary (UN Committee against Torture 2005).

According to section 1 of the Canadian Charter, Canadian courts have a duty to uphold the human rights and freedoms guaranteed to all by the Constitution, subject only to those limitations that are provided by law and are justifiable and reasonable in a free and democratic society. This is the legal test for restricting a right. In the Canadian Charter, only sections 3 (right to vote and be elected), 6 (right to enter and remain in the country) and 23 (minority language education rights) specifically protect only citizens. All other rights, as already stated, have to be equally available to *all* people under the purview of the Charter, and the Supreme Court has said that this means *every* person physically present in Canada and therefore subject to Canadian law. But what does this mean concretely?

Let's take the example of the constitutional guarantee of the right to equality before the law.[5] This right has often been interpreted as inapplicable to proceedings relating to foreigners whose situation is irregular. The reasoning behind this exemption is that such proceedings do not correspond to anything to which a citizen could be subjected. However, if an effect-based interpretation is adopted (like the one favoured by the Canadian Supreme Court in *Andrews*), there would be no reason to distinguish the detention of a foreigner from any other person's detention, since the effect of the detention in both cases (that is, the deprivation of physical liberty) is exactly the same. Deportation proceedings can also be distinguished by reference to their consequences. If the risk posed to an individual by a particular proceeding is death, torture or detention, or cruel, inhuman or degrading treatment, there is no reason to consider that proceeding to be less serious than those that would subject citizens to

similar treatment, such as criminal or extradition proceedings (Crépeau and Jimenez 2004).

The right to a fair trial is still understood to apply only to criminal proceedings. The whole of the treatment applied to foreigners whose situation is irregular, such as detention or deportation, is still regarded as administrative procedure to which fair trial provisions do not apply. This attitude originates in an era where administrative law was embryonic, and human rights instruments did not yet envisage the development of administrative law, much less its impact on rights and freedoms. If more modern human rights instruments are considered, one can see that the fair trial provision is being expanded to cover all proceedings under the law that can affect fundamental rights, regardless of their criminal or administrative character. The recent Charter of Fundamental Rights of the European Union does not make such a distinction. Article 47 of the charter extends the right to an effective remedy and to a fair trial to *everyone* whose rights and freedoms are guaranteed by the law of the union and have been violated.

In brief, the Supreme Court of Canada has opened the way in the past to the rights of foreigners in the country. The challenge today is to define the scope of the right to equality for foreigners in "times of crisis." In other words, the judiciary will have to address the issues raised by the new immigration and security measures, as their counterparts have already started doing so.

In the UK, for example, the British Law Lords ruled in a December 2004 judgment that the nation's *Anti-terrorism, Crime and Security Act 2001* (*ATCSA*) undermined basic human rights.[63] The *ATCSA* was introduced as emergency legislation after 9/11. One of the more notable powers in the *ATCSA* permitted the indefinite detention without charge and without prospect of trial of non-British citizens suspected either of having committed terrorist acts or of posing a threat to national security. The justification offered for enacting the new powers was that some foreigners were reasonably suspected of being involved in international terrorism but could not be prosecuted because there was insufficient admissible evidence to sustain a prosecution. At the same time, the presence of these individuals in the UK was a risk to national security, but they could not be deported to their countries of origin because of a fear that they would be tortured there, or to any other country because none was willing to admit them. Thus, the government argued that the only solution was to detain such people until they no longer presented a risk to national security or until some other third country was willing to take them. Since these new executive powers were clearly incompatible with article 5(1) of the European Convention on Human Rights (ECHR), which sets out a very limited set of specific circumstances in which a state may deprive people of their liberty, the British government purported to "derogate" from (that is, opt out of) its obligations under article 5.[65] In December 2004, the Law Lords ruled by a majority of eight to one that the powers of detention conferred by the *ATCSA* were incompatible with the UK's obligations under the ECHR. First, they were disproportionate, since the measures taken could not rationally be held to be "strictly required by the exigencies of the situation," the legal test for suspending rights under article 15 of the ECHR. Second, the powers of detention were discriminatory on the ground of nationality – that is, they were contrary to article 14 of the ECHR, since they applied only to foreign nationals suspected of terrorism, despite a comparable threat from terrorism suspects with UK nationality. This decision thus reaffirms the principle of equality under the law as a cornerstone of the legal system in democratic countries around the world. In brief, as Lord Hoffmann pointed out in this judgment:

> This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community... [S]uch a power in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory. [emphasis added][66]

This part of the *ATCSA* was replaced by the *Prevention of Terrorism Act 2005* in March 2005. This Act replaces detention in prison with "control orders" that allow for the imposition of an extensive and nonexhaustive set of conditions on the movements of the suspected person, which may amount to house arrest. Unlike the former provisions, the powers in the *Prevention of Terrorism Act 2005* can be applied to British and non-British suspected terrorists alike.

In December 2004, the House of Lords also found that a policy of greater scrutiny of Roma as opposed to non-Roma passengers travelling to the UK from the Prague airport was discriminatory on the basis of race or national origin and therefore in breach of both the *Race Relations Act 1976* and the UK's international and regional obligations.[v] The UK concluded in 2001 an arrangement with the Czech authorities allowing the UK's immigration service to set up a pre-entry clearance procedure at the Prague airport. As Czech citizens were not required to obtain a UK visa to travel to the UK, the travellers were stopped on the allegation that they were not genuinely seeking entry for the limited period allowed for visitors and business travellers. Most of those stopped were Roma. Section 19D of the *Race Relations Act* permitted discrimination on the basis of national or ethnic origin in the discharge of immigration functions. Although the operation at the Prague airport did not purport to apply section 19D, the Law Lords linked the two procedures and endorsed the conclusion of the UN Committee on the Elimination of all Forms of Racial Discrimination that section 19D of the British *Race Relations Act* was "incompatible with the very principle of non-discrimination" (UN Committee on the Elimination of Racial Discrimination 2003, para. 16). The Law Lords applied this by analogy to the Prague airport situation, stating that: "A scheme which is inherently discriminatory in practice is just as incompatible as is a law authorizing discrimination."[vi]

These British decisions exemplify what Chief Justice John D. Richard of the Federal Court of Canada stated:

> The role of the judiciary as resolver of disputes, interpreter of the law and defender of the Constitution remains unchanged in times of crisis. What must change however, are the tools and resources which judges draw upon when they are interpreting and applying the law. The events of September 11 and the response of the world...have created a new environment for judicial decision-making. Within this new climate, judges must adopt a global perspective in performing their role. (Richard 2002)

In applying and addressing the provisions related to the new security and migration legislation, judges should continue to hold Parliament to the high standards embodied in the Charter: the right to life, liberty and security of the person; freedoms of religion, association and expression; the equality provisions, and so on. Courts have consequently an immense role to play not only in defining the right to equality as it applies to foreigners, but also in encouraging societal recognition that meaningful equality implies protecting foreigners against human rights abuses to the same extent as citizens are protected. Societal recognition facilitated by the judiciary is extremely important in a period when sensationalist media and alarmist politicians call for strict border control, detention of asylum-seekers and deportation of illegal migrants, which they purport to justify by singling out migrants as being responsible for a whole range of social problems, including rocketing domestic crime rates, fundamentalist terrorism, collapsing welfare systems and mass unemployment.

The public reaction to situations like these is very strong and sometimes gives rise to worrying developments, such as extreme right-wing political movements, the escalation of racist violence and initiatives such as the Minuteman Project at the American-Mexican border. In Canada, the courts' insistence on safeguarding the rule of law, the Constitution and the Charter is a very important avenue for preventing citizens from taking justice into their own hands (Egan 2005).

Therefore, a new equilibrium between the requirements of security and the protection of the rights and freedoms of all – and those of migrants, in particular – will only be achieved by allowing the judiciary to test over time the constitutionality of the new security measures against our Charter standards of procedural fairness, fundamental justice and equal rights.

In a country founded on, and proud of, adherence to the rule of law, judicial review serves crucial functions. It brings independence to the process, an essential component when great individual interests are at stake. Courts also provide the appearance of independence, a vital characteristic of a system that wants not only to do justice but also to be seen as doing justice. The mere prospect of judicial review can have a sobering influence on administrative officials, encouraging them to approach their decisions carefully and explain their reasons intelligibly (Dyzenhaus 2001).

This means that all administrative decisions that affect fundamental rights of foreigners must be fully reviewed by a competent tribunal. Mechanisms must be found to allow them to meet the case made against them. Except for those few rights that are legitimately reserved for citizens, foreigners in Canada should enjoy the same rights as citizens and should be treated in substantially the same way as citizens. There is no rule of law when human rights guarantees are applied selectively.

Appendix 1
International and Regional Human Rights Instruments Referred to in the Text

- **American Convention on Human Rights**. Organization of American States, adopted November 22, 1969, entered into force July 18, 1978.
- **African [Banjul] Charter on Human and Peoples' Rights**. Organization of African Unity, adopted June 27, 1981, entered into force October 21, 1986.
- **American Declaration of the Rights and Duties of Man**. Adopted by the Ninth International Conference of American States, 1948.
- **Canadian Charter of Rights and Freedoms**. Entered into force April 17, 1982.
- **Charter of Fundamental Rights of the European Union**. Adopted December 18, 2000.
- **Charter of the United Nations**. Adopted June 26, 1945, entered into force October 24, 1945.
- **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**. Adopted December 10, 1984, entered into force June 26, 1987.
- **Convention against Transnational Organized Crime**. Adopted November 15, 2000, entered into force September 29, 2003.
- **Convention Governing the Specific Aspects of Refugee Problems in Africa**. Organization of African Unity, entered into force June 20, 1974.
- **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**. United Nations General Assembly, adopted December 18, 1990, entered into force July 1, 2003.
- **Convention on the Rights of the Child**. United Nations General Assembly, adopted November 20, 1989, entered into force September 2, 1990.
- **Declaration on Territorial Asylum**. United Nations General Assembly, adopted December 14, 1967.
- **Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live**. United Nations General Assembly, adopted December 13, 1985.
- **Declaration on the Protection of All Persons from Enforced Disappearances**. United Nations General Assembly, adopted December 18, 1992.
- **European Convention for the Protection of Human Rights and Fundamental Freedoms**. Council of Europe, adopted November 4, 1950, entered into force September 3, 1953.
- **Protocol no. 4 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms**. Council of Europe, adopted September 16, 1963, entered into force May 2, 1968.
- **International Covenant on Civil and Political Rights**. United Nations General Assembly, adopted December 16, 1966, entered into force March 23, 1976.
- **Inter-American Convention to Prevent and Punish Torture**. Organization of American States, adopted December 9, 1985, entered into force February 28, 1987.
- **International Convention on the Elimination of All Forms of Racial Discrimination**. United Nations General Assembly, adopted December 21, 1965, entered into force January 4, 1969.
- **Convention Relating to the Status of Refugees**. United Nations, adopted July 28, 1951, entered into force April 22, 1954.
- **Protocol Relating to the Status of Refugees**. United Nations, adopted January 31, 1967, entered into force October 4, 1967.
- **Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime**. Adopted November 15, 2000, entered into force January 28, 2004.
- **Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime**. Adopted November 15, 2000, entered into force December 25, 2003.
- **Universal Declaration of Human Rights**. United Nations, adopted December 10, 1948.
- **Vienna Declaration and Programme of Action**. World Conference on Human Rights, adopted July 12, 1993.

Appendix 2
Multilateral Human Rights Treaties

Treaties to which Canada is a party[1]			
Treaty	**Date adopted**	**Entry into force internationally**	**Entry into force in Canada**
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	10/12/84	26/6/87	24/7/87
Convention against Transnational Organized Crime	15/11/00	29/9/03	29/9/03
Convention on the Rights of the Child	2/11/89	2/9/90	12/1/92
International Covenant on Civil and Political Rights	16/12/66	23/3/76	19/8/76
International Convention on the Elimination of All Forms of Racial Discrimination	21/12/65	4/1/69	13/11/70
Convention Relating to the Status of Refugees	28/7/51	22/4/54	2/9/69
Protocol Relating to the Status of Refugees	31/1/67	4/10/67	4/6/69
Protocol against the Smuggling of Migrants by Land, Sea and Air[3]	15/11/00	28/1/04	28/1/04
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[4]	15/11/00	25/12/03	25/12/03
Treaties to which Canada is not yet a party			
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (United Nations)	18/12/1990		1/7/03
American Convention on Human Rights (Organization of American States)	22/11/1969		18/7/78
Inter-American Convention to Prevent and Punish Torture (Organization of American States)	09/12/1985	28/2/87	

[1] In some cases, there are reservations to the treaty. A reservation excludes a state from executing a particular provision of a treaty to which it is a party. This information was taken from Canadian Heritage (2005).
[2] Except article 41, which came into force March 28, 1979.
[3] Supplementing the United Nations Convention against Transnational Organized Crime.
[4] Supplementing the United Nations Convention against Transnational Organized Crime.

Notes

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1 According to article 1 of the 1951 Refugee Convention, the term "refugee" applies to "any person who...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

2 The concept of securitization has been developed by the Copenhagen School as a theoretical framework in order to allow them to contribute to the so-called "widening-deepening" debate in security studies, which became particularly intense after the Cold War. The "widening" dimension concerns the extension of security to issues or sectors other than the military one, whereas the "deepening" dimension questions whether entities other than the state should be able to claim security threats. The objective, then, was to enlarge the concept of security without rendering it too broad or meaningless, a fear that has been regularly expressed by those security scholars who have retained a traditional (that is, military and state-centric) understanding of security. Interestingly, the Copenhagen School did not share the traditional perspective of security, which considers security the opposite of insecurity and holds that "the more security, the better." Rather, by questioning whether it was a good idea to "frame as many problems as possible in terms of security," the Copenhagen School has always insisted on the negative impact of securitization, like, for example, the reinforcement of an exclusive logic of "us versus them." For that reason, securitization currently represents the most promising concept that can be used to study migration as a security issue (Krause and Williams 1996; Buzan, Waever and De Wilde 1998; Léonard 2004).

3 The European human rights protection system has, to date, developed the most elaborate case law. It has pioneered concepts, created substantial and procedural tests and generally done the groundwork for other human rights protection systems. It is therefore not surprising that it is referred to systematically in other jurisdictions, and in Canada in particular, as a source of inspiration, if not a precedent-setting mechanism.

4 See the Universal Declaration of Human Rights (art. 14), 1993 Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, 1951 Refugee Convention (arts. 26, 31), International Covenant on Civil and Political Rights (arts. 9, 16), International Convention on the Elimination of All Forms of Racial Discrimination (art. 5), American Declaration of the Rights and Duties of Man (art. XXVII), American Convention on Human Rights (art. 22[7]), and the African Charter (art. 12[3]).

5 See the Declaration on the Protection of All Persons from Enforced Disappearance (art. 8), Declaration on Territorial Asylum (art. 3[1]), Inter-American Convention to Prevent and Punish Torture (art. 13[4]), American Convention on Human Rights (art. 22[8]), and the Organization of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa (art. II[3]).

6 "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture....For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consisted pattern of gross, flagrant or mass violations of human rights."

7 *Khan v. Canada*, Communication no. 15/1994, (CAT/C/13/D/15/1994); U.N. Doc. A/50/44 at 46 (1995).

8 *Falcon Rios v. Canada*, Communication no. 133/1999, December 17, 2004. The committee found that the IRB had discounted strong evidence that Mr. Falcon-Rios had been tortured and that the way the evidence had been treated constituted a denial of justice.

9 See *Soering v. United Kingdom*, Judgment of 7 July 1989, Series A, Vol.161; *Nsona v. The Netherlands*, Judgment of 28 November 1996, 1996-V, no. 23; *Chahal v. The United Kingdom*, Judgment of 15 November 1996, 1996-V, no. 22; *Ahmed v. Austria*, Judgment of December 7, 1996, 1996-VI, no. 26; *Scott v. Spain*, Judgment of 18 December 1996, 1996-VI, no. 27; *Loizidou v. Turkey*, Series A, no. 310, Judgment of 18 December 1996 [1996] IIHRL 112; *Boujlifa v. France*, Judgment of October 21, 1997, 1997-VI, no. 54; *D. v. The United Kingdom*, May 2, 1997, 1997-III, no. 37; *Paez v. Sweden*, Judgment of October 30, 1997, 1997-VII, no. 56. Article 8 of the European Convention on Human Rights, which guarantees the right to family life, has also been used by noncitizens in deportation cases: the decision to expel a family member may constitute an undue and disproportionate "interference" with the right to respect for family life. See Rogers 2003; *Beldjoudi v. France*, Judgment of March 26, 1992, Series A, no. 234-A; *Mehemi v. France*, Judgment of September 26, 1997, 1997-VI, no. 1. The right to family life is also affirmed in many other human rights instruments: International Covenant on Civil and Political Rights (arts. 17, 23); American Convention on Human Rights (arts. 17, 19); African Charter (art. 18); Convention on the Rights of the Child (arts. 3, 9, 10, 16).

10 *Immigration and Refugee Protection Act*, 2001, c. 27 (hereafter IRPA).

11 See International Covenant on Civil and Political Rights (art. 13); 1951 Refugee Convention (art. 32); Protocol 7 to the European Convention on Human Rights (art. 1); American Convention on Human Rights (art. 22 [6]); African Charter (art. 12[4]); Declaration on the Human Rights of Individuals who are not Nationals of the Country in Which They Live (art. 7).

12 See also Fourth Protocol to the European Convention on Human Rights (art. 4), American Convention on Human Rights (art. 22[9]), African Charter (art. 12[5]).

13 See International Covenant on Civil and Political Rights (art. 2[3]), European Convention on Human Rights (art. 13), American Convention on Human Rights (art. 25), African Charter (art. 5).

14 *Chahal v. The United Kingdom*, Judgment of November 15, 1996, 1996-V, no. 22.

15 Charter of the United Nations (arts. 1[3], 55[c]).

16 *Case concerning Barcelona Traction, Light and Power Company*, 1970 I.C.J. 33-4.

17 For case law, see: Human Rights Committee, *Gueye et al. v. France*, Communication no. 196/1985, UNGAOR, 44th Session Supp. no. 40; UN Doc. See also A/44/40 (1989) 189. See also Human Rights Committee, *Joseph Franck Adam v. Czech Republic*, Communication no. 586/1994, UNGAOR, 51st Session, Supp. no. 40, UN Doc. A/51/40 (1996) 165.

18 According to dualist theory, the national and international legal orders are two distinct spheres of law, each functioning according to its own rules and conditions. A treaty establishes interstate obligations addressed to the organs of the state, but not to individuals. In dualist systems "statutory incorporation" is therefore mandatory for an international treaty to acquire the force of law in the country.

19 See *Reference Re Public Service Employee Relations Act* (Alta.), (1987) 1 S.C.R. 313, at 349-50, wherein Chief Justice Dickson states that the norms of international law "provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada's international obligations under human rights conventions."

20 *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982.

21 *Baker v. Canada*, [1999] 2 S.C.R. 817. Ms. Baker was an irregular migrant who had lived in Canada for several years and given birth to four Canadian children. In order to prevent her deportation and the resulting separation from her Canadian children, she requested an exemption on humanitarian and compassionate grounds from the rule that one must apply for permanent residency from outside Canada.

22 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3. Notwithstanding this conclusion, the court left a small window open for the balancing test in "exceptional circumstances," without indicating what exactly these were. Canadian courts have, moreover, refused to abide by the interim measures request of the Human Rights Committee on the basis that "neither the Committee's views nor its interim measures requests are binding on Canada as a matter of international law, much less as a matter of domestic law," a statement that plainly contradicts the relevant jurisprudence of the Human Rights Committee. See *Ahani v. Canada*, (2002) 58 O.R. (3d) 107 (C.A.), leave to appeal refused, [2002] 1 S.C.R. 72, and the scathing appraisal by Joanna Harrington (Harrington 2003).

23 *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177. This concept of security of the person was further developed to mean "personal autonomy (at least with respect to the right to make choices concerning one's own body), control over one's physical and psychological integrity which is free from state interference, and basic human dignity." *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519. See also *Morgentaler v. R.*, [1988] 1 S.C.R. 30.

24 *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, at 206.

25 In *Chiarelli*, the Supreme Court emphasized that "[t]he most fundamental principle of immigration law is that noncitizens do not have an unqualified right to enter or remain in the country." From this reinscription of the distinction between a right and a privilege (derived from common law and Bill of Rights jurisprudence), it is a short step to conclude that the principles of fundamental justice require very little of state actors when deciding to remove noncitizens, unless the person in question is at risk of death or (perhaps) torture. In *Ahani v. Canada* (T.D.), [1995] 3 F.C. 669, and again in *Charkaoui (Re)*, 2003 F.C. 1419, the federal court stated that the imperatives of immigration policy must govern the context (for example, in *Charkaoui* [F.C.], the right of the state to safeguard protected information for reasons of national security) and in *Charkaoui* [F.C.]) again, the right of a permanent resident to be adequately informed of allegations against him so he can defend himself). In both cases, there was an emphasis on the fact that noncitizens do not have an unqualified right to enter or remain in the country.

26 *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

27 See *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711; *Baker v. Canada*, [1999] 2 S.C.R. 817; *Suresh v. Canada*, [2002] 1 S.C.R. See also *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643.

28 *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

29 See *Lavoie v. Canada*, [2002] 1 S.C.R. 769. See also *Charkaoui (Re)*, 2004 F.C.A. 421; *M.A.O. v. Canada (Minister of Citizenship and Immigration)*, 2003 F.C. 1406; *Canada (Minister of Citizenship and Immigration) v. Obodzins*, 2003 F.C. 1080; *Chen v. Canada (Minister of Citizenship and Immigration)*, 2003 F.C. 1059; *Khorasani v. Canada (Minister of Citizenship and Immigration)*, 2002 F.C.T. 936; *Mazuryk v. Canada (Minister of Citizenship and Immigration)*, 2002 F.C.T. 257; *Sieradzki v. Canada (Minister of Citizenship and Immigration)*, 2003 F.C.T. 225.

30 Canada-US Smart Border Declaration, signed December 12, 2001, by John Manley, minister of foreign affairs and international trade (Canada) and Tom Ridge, director of the Office of Homeland Security (US).

31 During the 1980s, a debate opened up about the meaning of the concept of "free movement of people." France, Germany, Belgium, Luxemburg and the Netherlands decided in 1985 to create a territory without internal borders. This became known as the "Schengen area," named after the town in Luxembourg where the first agreements were signed. This cooperation expanded to include 13 countries in 1997, following the signing of the Treaty of Amsterdam, which in 1999 incorporated into EU law the decisions taken since 1985 by Schengen group members.

32 *Haitian Interdiction v. US*, Report 51/96, Case no. 10.675, Decision as to the Merits, 13 March 1997, Inter-American Commission on Human Rights, Report 1996, 598-602. The court decided that this interdiction, turning away boatloads of Haitian asylum seekers, denied them the right to seek asylum not only in the US, but also in other countries. There was also discrimination in this case, since Haitians were interdicted but not Cubans. There was also no access to the courts in the US.

33 The statistics upon which these calculations are made are not accessible, the controls that are computed here are from restricted border areas and it is difficult to know precisely what meaning to assign to the percentages cited by governments.

34 See *Amuur v. France*, Judgment of 25 June 1996, 1996-III, no. 11. See also *Shamsa v. Poland*, Judgment of November 27, 2003, nos. 45355/99 and 45357/99. In these two cases, the European Court of Human Rights found that there had been a violation of article 5.1 of the European Convention on Human Rights.

35 The term "jurisdiction," in the view of the committee, refers "not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred" (UN Human Rights Committee, *Celeberti de Casariego v. Uruguay*, Communication no. 56/1979, final views of July 29, 1981, 13th session, at para. 12.2). Since the committee initially adopted this position, it has been amply confirmed, especially during the construction by Israel of the fence/wall inside the Occupied Territories: "Nor does the applicability of the regime of international humanitarian law preclude accountability of States Parties under article 2, para. 1 of the Covenant for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State Party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law" (UN Human Rights Committee 2003, para. 11). Equally, the committee stated: "The Committee is deeply concerned that Israel continues to deny its responsibility to fully apply the Covenant in the occupied territories" (UN Human Rights Committee 1998, para. 10). The same position has been adopted by the Committee on Economic, Social and Cultural Rights under the International Covenant on Economic, Social, and Cultural Rights: "The Committee also reiterates its concern about the State Party's position that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction, and that the Covenant is not applicable to populations other than the Israelis in the occupied territories. The Committee further reiterates its regret at the State Party's refusal to report on the occupied territories (E./C.12/1/Add. 27, para. 11)" (UN Committee on Economic, Social and Cultural Rights 2003, para. 15). These views have been strongly endorsed by the International Court of Justice in the advisory opinion it delivered on July 9, 2004, regarding the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (paras. 102-13).

36 In June 2004, the Israeli Supreme Court (sitting as the High Court of Justice) declared invalid a number of orders under which land was seized to construct the separation barrier in the occupied territories. It decided that a 40-kilometre segment of the barrier disproportionately affected the lives of Palestinians and should be moved. *Beit Sourik Village Council v. Government of Israel*, 2004 H.C.J. 2056/04.

37 See Inter-American Commission on Human Rights, *Coard et al. v. United States*, Case 10.951, Report no. 109/99, September 29, 1999, at para. 37; Inter-American Commission on Human Rights, *Request for Precautionary Measures in Favor of Detainees Being Held by the United States at Guantanamo Bay*, March 12, 2002, I.L.M., 2002, vol. 41, at 532-5.

38 *Loizidou v. Turkey*, Judgment of December 18, 1996, 1996-VI, no. 26.

39 *Rasul v. Bush*, no. 03-334; *al Odah v. United States*, no. 03-343, 542 U.S. __ (2004)(slip. op.); *Rasul v. Bush*, no. 03-334; *al Odah v. United States*, no. 03-343, 542 U.S. __ (2004) (oral argument).

40 *R v. Immigration Officer at Prague Airport, ex parte European Roma Rights Centre*, [2004] U.K.H.L. 55. See further developments mentioned in the conclusion to this article, entitled "The Right to Equality and the Role of the Judiciary."

41 The grounds for judicial review, set out in section 18.1(4) of the *Federal Court Act*, are that the tribunal whose decision is being challenged: (1) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction; (2) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe; (3) erred in law in making a decision or an order, whether or not the error appears on the face of the record; (4) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it; (5) acted, or failed to act, by reason of

fraud or perjured evidence; or (6) acted in any other way that was contrary to law.

42 In the US, detention is also automatic for "asylum applicants from nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated...for the duration of their processing period" (Macklin 2003, 14). The US is also criticized for the prolonged detention of asylum-seekers in unacceptable conditions, such as detaining them with convicted criminals, as demonstrated in several Amnesty International reports of the past years (Crepeau and Jimenez 2004). Australia has been heavily criticized for its detention camps, like the one in Woomera (Crock 2002).

43 Details regarding the cooperation are found in the *IRPA* Regulations, s. 247. The regulations that accompany the *Immigration and Refugee Protection Act* have been finalized and were published in a special June 14, 2002, edition of the *Canada Gazette*. These regulations set out the details and procedures that Citizenship and Immigration needs to administer the new Act.

44 A gender-based analysis of the *IRPA* by Citizenship and Immigration Canada reveals that women and children (that is, vulnerable groups of asylum-seekers) are the most unlikely to be provided with identity documents because of prevailing traditions and cultural norms, the administrative inefficiency of source countries, remote geographical locations, overtly discriminatory practices and persecution, or the destruction of documents through wars or armed conflicts. The study then concludes: "Proposals that place a priority on documentation, and that base credibility assessments on documentation, without weighing this kind of evidence against other forms of validation, could have disproportionate and negative impacts on women" (CIC 2002).

45 This 1995 agreement included a series of measures to improve cooperation between customs and immigration officials in both countries.

46 Canada–US Smart Border Declaration, signed December 12, 2001, by John Manley, minister of foreign affairs and international trade (Canada) and Tom Ridge, director of the Office of Homeland Security (US) http://www.dfait-maeci.gc.ca/anti-terrorism/declaration-en.asp (accessed January 13, 2006).

47 *Act to Amend the Aeronautics Act*, S.C. 2001, c. 38 (Bill C-44), assented December 18, 2001.

48 Statement by the privacy commissioner of Canada, George Radwanski. Press release, April 9, 2003. http://www.privcom.gc.ca/media/nr-c/2003/02_05_b_030408_e.asp (accessed January 13, 2006).

49 See "EU Signs Security Deal with Canada," Canadian Press, October 3, 2005.

50 The task force was created to enhance security, but there are four other spheres of policy in which greater cooperation is needed: deepening economic integration, reducing the development gap, harmonizing regulatory policy, and devising better institutions to manage conflicts that inevitably arise from integration and exploit opportunities for collaboration (Manley et al. 2005; Canadian Council of Chief Executives 2005).

51 *REAL ID Act* of 2005 (H.R. 418). The *REAL ID Act* was put on the floor of the House on January 26, 2005 to expand the *USA PATRIOT Act*. See National Immigration Forum (n.d.). For a comparison between Canada and the US, see the Canadian Council for Refugees (2005a).

52 *USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act)*, H.R. 3162 R.D.S., (October 24, 2001); *Anti-terrorism Act*, S.C. 2001, c. 41.

53 The Supreme Court indeed explicitly mentioned that this term must be interpreted broadly and is not to be limited to "direct threats" to Canada. *Suresh v. Canada*, [2002] 1 S.C.R. 3, at paras. 87-8.

54 *Chiau v. Canada*, [2001] 2 F.C. 207 (C.A.).

55 *R. v. Jacques*, [1996] 3 S.C.R. 312.

56 Factors to be considered in determining whether a person is a threat to national security are set out in section 34 of the *IRPA*. They include past, present or future engagement in espionage or acts of subversion against a democratic government, institution or process; or instigation or the subversion by force of any government; engagement in terrorism; constituting a danger to the security of Canada; engaging in acts of violence; or holding membership in a group planning the subversion of a democracy. Factors to be considered in assessing violations of human or international rights, and serious or organized criminality are set out in sections 35-7 of the *IRPA*.

57 Section 78(e) of the *IRPA* provides that at the government's request, "the judge shall hear all or part of the information or evidence in the absence of the permanent resident or the foreign national named in the certificate and their counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person." Section 78(h) provides that "the judge shall provide the permanent resident or the foreign national with a summary of the information or evidence that enables them to be reasonably informed of the circumstances giving rise to the certificate, but that does not include anything that in the opinion of the judge would be injurious to national security or to the safety of any person if disclosed."

58 *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711.

59 *Jaballah v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. no. 420.

60 The court did not indicate, however, what exceptional circumstances might justify deportation to torture or address the situation of those who may be subject to continued detention because their removal would not be constitutional. Determinations are at the discretion of the minister and the minister's exercise of discretion is given judicial deference. *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R.

61 *Ahani v. Canada* (T.D.), [1995] 3 F.C. 669. The United Nations Human Rights Committee subsequently indicated that the deportation of Ahani before it had decided the complaint violated Canada's obligations under the International Covenant on Civil and Political Rights and reaffirmed the absolute prohibition on torture under international law. *Mansour Ahani v. Canada*, Communication no. 1051/2002, U.N. Doc. C.C.P.R./C/80/D/1051/2002 (2004).

62 *Ahani v. Canada* (T.D.), [1995] 3 F.C. 669; *Charkaoui (Re)* [2003] F.C. 1419; *Charkaoui (Re)* [2004] F.C.A. 421. See above, part I.B.2.a. ("Section 7: Fundamental Justice Is Owed to Foreigners").

63 Section 15(1) of the Canadian Charter states: "Every individual is equal before and under the law and has the right to equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability."

64 *A (F.C.) and Others (F.C.) (Appellants) v. Secretary of State for the Home Department (Respondent)*, [2004] U.K.H.L. 56.

65 In 1998, the UK incorporated the European Convention on Human Rights into its domestic law. More precisely, the British human rights legislation creates a mechanism for the courts to bring to Parliament's attention situations where there is a breach or potential breach of human rights in primary legislation. Under article 5(1) of the European Convention on Human Rights, the specific circumstances under which a state may deprive persons of their liberty include the detention of a person with a view to bringing him or her before a court on charges of having committed a criminal offence and the detention of an individual with a view to deportation. The powers of detention in the *Anti-Terrorism, Crime and Security Act* (*ATCSA*) were not grounded upon reasonable suspicion of a criminal offence with a view to prosecution, nor were they grounded upon detaining persons with a view to deportation. Article 15 of the European Convention on Human Rights only permits a contracting party to derogate from its obligations under the convention "in time of war or public emergency threatening the life of the nation." Any derogating measures must be limited to "the extent strictly required by the exigencies of the situation" and must be consistent with the state's other obligations under international law.

66 *A (F.C.) and Others (F.C.) (Appellants) v. Secretary of State for the Home Department (Respondent)*, [2004] U.K.H.L. 56, at para. 97.

67 *R v. Immigration Officer at Prague Airport, ex parte European Roma Rights Centre*, [2004] U.K.H.L. 55. Lord Steyn precisely referred to article 2 of the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD), to article 26 of the International Covenant on Civil and Political Rights, and to the customary international law rule of nondiscrimination (see paras. 44-6).

68 *R v. Immigration Officer at Prague Airport, ex parte European Roma Rights Centre* [2004] U.K.H.L. 55., at para. 103.

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